Seth P. Staples (Seth Perkins), 1776-1861

Manuscript notes of lectures by Tapping Reeve taken down by Seth P. Staples.

The catalogue of Litchfield Law School does not list Staples as a student there. But he may have attended the school for a short time. This notebook was used by Staples for the instruction of students in his New Haven law office.

Staples, Seth Perkins, 1776-1861. "Notes taken from lectures delivered by Tapg. Reeves, esqr." [1798?]. 984 p. Call # MssB L71 +1798.

Many pages are blank. Contains autograph of Seth P. Staples.

The catalogue of Litchfield Law School does not list Staples' name, nor do biographical sketches mention his studying there. He may have attended the school for a short time or obtained permission to copy Reeve's lectures. This notebook was probably used by Staples for the instruction of students in his New Haven law office.

[Reeve, Tapping]

Manuscript notes of lectures ... at the Litchfield law school, taken down by Seth Staples]

Seth Staples

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Notes taken from Lectures
delivered by
Jas. Reeves Esq.

Of Common Law

Municipal law is very properly defined by Judge Blackstone to be a rule of civil conduct prescribed by the supreme power in a state commanding what is right & prohibiting what is wrong" Sanctio justa jubens honesta, contraria prohibens.

Cicero

We make a great number of divisions as mercantile law, maritime law, civil law &c. is inaccurate, Municipal law is not capable of more than two divisions — Statute Law & Common Law

Of Com. Law

What is not to be found in the Stat. Book is called com. law, which is the general custom of the land. There is no volume to which we can resort to determine the com. law: Hence it is called the "lex non scripta". In the more strict signification of the term, general custom forms the com law, while particular customs form rather the usage of particular places, than the com law; or, perhaps, the particular customs of particular places may properly enough be denominated, the com law of those particular places. What the com. law is to the whole country, particular customs are to particular places. As, for instance the custom of Kent, that lands should descend to all the males alike, commonly called gavelkind, is the com law of that particular place. Both depend on particular custom of that particular place, or the practice of the country, whether the whole country or a part of the country.

Mercantile & Maritime Laws are applicable to particular transaction only. Laws Maritime relate to those matters only which are transacted upon water or the high seas. The Law of Merchants is the particular customs of Merchants which have become established among them relative to their business. The laws Merchant & the Maritime laws are both branches of the com. law, or Stat law as the case may be. By some it has been referred to the head of particular customs, or laws which affect the inhabitants of particular districts only. These laws are, for the benefit of trade allowed to be of the highest authority, agreeably to the maxim of law that "cui libet in sua arte credendum". In Mercantile transactions the least deviation from perfect rectitude makes the whole contract void.

Of Com. Law

There are certain maxims or customs (for they are the same) admitted to be principles of the common law. When established they are the com. law itself; & so far we have a criterion by which we can determine what the com. law is. There is a collection of these maxims at the end of Lofft's Reports.

Lofft's maxim

Precedents.

When these maxims customs & that law fail, the Ct must consider the case as novel, & must resort to reason & justice for its decision. They are bound by their oaths to judge according to what they consider just & reasonable. Their Judgmt or decision of the Ct forms a precedent for the decision of subsequent cases under like circumstances. It is not true that Cts of Law never make laws. It is true that they do not make the law of reason; but they make decisions according to that law. Nineteen twenty fourths out of a thousand of the com. law of Eng. have been made by their Cts of Law

4. Co. 94

The decisions of Courts, without any other established maxims in the case except those of reason, form the com law. Unless Courts made law they could not get along: at least they establish the evidence of what the law is. Precedents are not themselves law; but only furnish prima facie evidence of what the law is; otherwise it would be impossible ever to alter them. Courts have no power to alter established laws. If precedents were to govern absolutely & be invariably pursued in all cases, it would preclude all improvement not only in law but in every thing else.

It is often said by Courts that such & such precedents were not law tho pursued for a whole century together. Hence precedent & principle are not synonymous terms. For it may happen that the Judge may mistake the law. But a decision against every sound principle of ~~com~~ law would be a precedent for every decision in a precedent; yet it is equally true that such a decision would

not be law & that every precedent is not law. If it be true, that every precedent is law, then it will follow that every decision of a Court is law; which is too absurd to be seriously maintained by any person. It is frequently said that such a decision was against law, yet what is against law cannot be law. In all cases we should examine the principles that govern, without rigidly adhering to precedent. Precedents tho useful do not make a genuine or liberal Lawyer, but only a technical one.

As there is a decent respect to be paid to men of learning, so there ought to be great caution in departing from their opinions. Reason alone clearly deduced can warrant the departure. But the argument drawn from the number of precedents is weakened or strengthened by considering whether the precedents have been established by ignorant & independent & consequently weak Judges who are always fearful of shaking the opinions of great men, however absurd,

or whether they have been established by indefatigious, learned & independent judges of the law, as a Hale or a Mansfield.

In case of contradictory decisions or precedents judges are to examine & peruse the same conformable to the governing principle, from which they are not to depart.

Mere positive rules of law, as that a gaoler shall be answerable for the escape of a debtor &c are not to be departed from, altho not agreeable to reason —

In such cases the Ct must decide according to established principle whether reasonable or not. They are not to decide whether established principles are reasonable, but what is agreeable to those established principles. Jac

respects the Court established principles are merely positive, & in far as the Ct. is concerned have no relation to reason.

The time of legal memory is one since the accession of Rich. 1. Immemorial usage means things or customs that obtained before that time.

But this forms but a trifling part of the com. law. Many entire branches of law, as the law of Attachments, the law of Praeaphemalia & executory devises were as perfectly unknown at that time as the Chinese language. The law of Praeaphemalia is a system of rules which were established by Lord Hardwicke during his thirty years of Chancellorship. The law respecting

Term Rep. 93

Executory Devises took its rise in the reign of queen Elizabeth. So that it is not necessary for the validity of com. law that it should have existed from time whereof the memory of man runneth not to the contrary.

The Decisions of our Courts & the customs of our Country are a part of our com. law, & the law of our County

The civil law, as such, is no part of the law of Eng.d or of this country, any further than it has been adopted by Cts of Justice, or our legislatures. If, either in Eng. or the U. States it becomes the customs of the people by long establishment, or has been adopted by Cts of justice, it then becomes a part of the com. law, or leges non scriptae: if adopted either by a legislative body in Eng. or U. States it becomes a part of our Stat. law. So far as it has been established

by any of those means it is binding and no farther. The same process is now pray before the com. law of Eng. can gain any authority in Connecticut.

It has been made a question how far the stat. of Eng. are binding in this Country. The general received opinion is, that those only are obligatory which were enacted previous to the emigration of our ancestors. They are considered of the same authority as the Eng. com. law. The com. law of Eng. has been adopted so far as it has been considered as applicable to the local circumstances of our Country; but when it has been considered as inapplicable, it has been rejected.

In Connecticut the com. & stat. laws as they stood previous to or about the middle of the reign of Henry the 8th have been considered as binding. No good reason is given for fixing that period in preference to any other. All decisions in the Eng. courts on the com' law since that period have been considered as not binding in this State, tho their decisions have been followed as precedents when consistent with reason & applicable to our country.

It has been the uniform opinion in Con't, that when the Legislature enact a stat. in the words of an Eng. stat. that they adopt the construction given it by the Eng. Courts; & that the decisions made before its adoption in that country by the Eng. Courts are equally binding with the decisions of our own Courts.

Those rules or regulations which prevail generally thro' any country are called the com. law of that country; those which are to be found in particular places only are called the customs or usages of those places. A Court is bound always to take notice, of themselves, of the com. law; but the customs & usages of particular places, which are called particular customs, must be pleaded specially by the party wishing to take advantage by them, & such special customs when pleaded should be entered on record.

Lectures on Law } Sept. 10th 1798

by

J. Trevett Esq. one of the judge of the S. Court in Connecticut

Of Statutes

The ancient Eng. Stat. have the same kind of authority here as the com. laws of England.

It is not altogether so important in this State as in England to observe the distinction between public & private statutes; since, in pleading both may be given in evidence under the gen. issue, & need not be specially pleaded. There is however, this difference between them in common. One may defend under a public stat. without reading it on the gen. issue. A private stat. must be read in such a case. And in all other cases, as well here as in England, in which an action is brought on a private stat. it is indispensably necessary to declare on the stat. for it will not answer for the Pltff. in this case to rely on giving the stat. in evidence

The distinction between a public & a private stat. is not very clearly defined. A statute respecting all Taylors or all Carpenters &c. is a private statute. One respecting all Officers qualified to serve a legal process is public. One respecting all constables is private. Yet, however, in any of these cases the stat. inflicts a fine or penalty to the King in Eng. or to the State here, the public being thus concerned, the stat. could be public.

4 Rep. 76
2 Saund 154
1 Lev. 86
Ld Raym. 120. 381

See 4. Rep. 76. in a different case on this subject —

In England a public stat. if intended to defeat a specialty must be pleaded — not so here. But our practice has long been

conformable to the of Hammon English rule.

2 Show. 30

It is said that a st. which speaks affirmatively does not abrogate the com. law, unless the stat gives a lower remedy. This cannot be true in all cases: For a stat which speaks in the affirmative may be & frequently does not necessarily imply a repeal of the com. law. As if sufficient notice of a suit was at com. law 100 days & a stat. should enact that 10 days should be given. Yet in such cases the Eng. Courts have decided that the com. law is not repealed. It is also said of two affirmative stats that the former is not repealed by the latter. This Mr Rivers supposes to be the case only in those instances, in which there was an antecedent com. law remedy. But that if there were no com. law remedy the former is repealed by the latter, tho both the stats are affirmative.

2 Rep. 61
1 Show 520
Cro Ch 104

When there is an existing remedy at com. law & at the same time a remedy by stat. it is necessary for the Pltff who brings his action on the stat. to declare upon it tho it be public. Otherwise it would not be known from the declaration which remedy he intended to pursue.

Vide infra

2. id. 581
1 Com. Dig. 315
Title Action on Stat G.

In some cases in which stats have declared certain acts "void" Courts have adjudged them voidable only. It is said that when a stat declares an act void to all intents & purposes it must be

adjudged void. But that when the act is declared void only, it may be adjudged void-able. Mr Rivers supposes the true reason to be this; that if the object of the stat. would be defeated by the act being confirmed void-able only; it must be adjudged void: But that otherwise it may be adjudged void-able; and that the words "to all intents & purposes" have no other meaning or operation.

10 Rep. 76
2 Mod. 57

Declarations on private statutes must recite the stat substantially, as in actions on specialties; but not verbatim. To declarations on such stats, nul tiel record may be pleaded. It is a gen. rule, that in actions on a public stat. the Deft need not count upon the stat, i.e. need not allege that the wrong stated in his declaration is contra formam statuti. To this rule the exceptions are very numerous. Where a gen. stat prohibits an act or creates a duty & gives no remedy or gives single damages only (see infra) or where a gen. stat extends a remedy to a new case in which there was no remedy before, (as the stat. of Westm. 2. de asportatis &c extends the actions of trespass, for an injury committed by testator against Executor) counting on the stat is not necessary; as it is in all cases, in which penalties are to be recovered. In all cases in which more than single damages are to be recovered on a gen. stat. counting on the stat is necessary. If a contract, conveyance &c

Cro. El. 601

Vide supra #

Statutes

which at com. law were good without being reduced to writing, are by stat. required to be written, it is not necessary for the person declaring on the stat. contract, conveyance, to aver that it is in writing. It is sufficient that the fact appear in evidence. But if a stat. makes writing necessary to the validity of the instrument, unknown to the com. law, as in the case of a devise, the declaration must aver that it is in writing. This rule has been recognised by our Courts.

The civil Law so far as it is received in England derives all its authority from such adoption. The subjects of that kingdom are not bound by any of the rules or maxims of the Civil Law untill they have been sanctioned either by legislative or judicial authority. The maxims of the civil law, when adopted by the Kings Courts in a series of adjudications sufficient to form what is called the authority of precedent, virtually become a part of the com. law itself. In the same manner when the rules of the civil law are adopted & sanctioned by Parliament, they are transformed into a part of the stat. law of England.

The common & stat. laws of Eng. before they acquire any authority in the U. States require a similar sanction. They may be adopted or

rejected by our Courts & Legislatures as not appears applicable or inapplicable to the circumstances of our country; & they become a part of our com. law or stat. law according as they are sanctioned by our judicial or legislative authority.

Rose. 200
5 John. R. 175
Ulmy v Hardy
13 John 372
Seymour v Smith
10 John. 392
1 Com Dig. Action on Stat C. 44
3 Mass. 310.
1 Com. Dig 448 and Am. authorities
5 Mass. 514
7 Wash 202
2 Inst. 200

A Stat. does not, by giving a new remedy, annihilate that which before existed at com. Law, unless the remedy thus given be more limited than that which the com. law afforded. But when it thus prescribes a smaller remedy, than might have been before obtained, it is construed as totally abrogating the greater. When the stat & com. law offer different remedies, either may be pursued except in the instances before mentioned of the party proceeding. If the Plaintiff, when thus entitled to one of two existing remedies, should pursue by legal steps that which the stat offered & fail, he might in the same suit, resort to the com. law remedy & recover. But if the stat remedy be pursued it is necessary to declare on the Statute.

Moore 150
Hawk 211

6
Ibid. 212. 361
385.

Statutes

8 Mod 260 Yet if a remedy be created by stat. in any case in which none existed at com. law; or the stat. giving a remedy, requires a mode of proceeding unknown to the com. law, the stat. must be alone & strictly pursued. But

Cro. Eliz. 655
10. Mod. 337
Id. 385

if the stat. imposes a new duty & gives no remedy, the com. law will lend its aid & afford a remedy. In this case the offender may be punished for a misdemeanor, as for having violated the salutary regulations of society. But when a statute, which renders any act or omission illegal, which was not so at com. law, does give a remedy, no other remedy than that afforded by the stat. can be pursued.

10 Mod 115
8 Rep. 118
Hobart 87. 89
1 Black. Com. 91.

It is held that all statutes contrary to reason, or the laws of God are void. This principle, it is conceived, is hardly defensible.

2 Rob. Ab. 565
Hob. 309 111
Cro. El. 424

In England, if no period be fixed for the commencement of the operation of a stat. it is, of course, considered as binding from the first day of that session in which it was enacted.

This rule must operate, in most instances, as an ex post facto Law; & as such must do great injustice, especially as it often offends against positive law. The time at which a statute commences its operation in this State appears not to be fixed by any uniform rule. Justice, however, demands that all, who may be affected by the operation of a law, should be allowed the means of knowing it before they are made liable to its penalties. This is the principle that governs our Courts.

Of the Construction of Statutes.

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1 Black. Com. 88

Statutes giving greater remedies than the rules of natural justice could require are denominated penal. The gen. rule with regard to the construction of penal & remedial Statutes, is that the former be strictly, the latter liberally construed.

By this rule, respecting the construction of Statutes strict & liberal construction of statutes, is meant, that in the one case the literal meaning of the Law; & in the other the intention of the Legislature, collected from reasonable & necessary inference, shall be observed. But from this rule the Courts of Westminster have in many instances widely deviated.

1 Mod 282
6 Mod. 86
Cro. Car. 71

If a man by the repetition of a crime be subjected by law to an additional punishment or penalty, in which case it becomes necessary to prove a former offence similar to that of which he is indicted, this requisite proof can be offered from a former legal conviction only. No other testimony than that of a record is admissible. In this case the highest possible evidence is absolutely necessary. In most & all cases, the highest testimony the nature of the case, all circumstances considered will admit is required.

Some penal statutes are also remedial. With regard to these, the prevailing practice has been to follow rigidly the rule of strict construction, when the prosecution is instituted by the public; but otherwise, when the individual injured is the prosecutor in his own behalf. This rule has not been uniformly adhered to.

Any universality of expression with respect to persons, is not construed to comprehend those who by reason of legal inability are already exempted from laws similar in nature, or operation to those laws or states in which such universality of expression may have been used. Thus in penal statutes the words "all persons" do not embrace lunatics &c. A statute enabling "all persons" to dispose of their property, by a particular mode of conveyance, is not to extend to persons who were before unable to convey the same property by methods then lawful.

Prison Dow. 1.41

4. Persons capable of prosecuting on penal Statutes —

If an offence directly & equally affects all the individuals in any community by disturbing its peace, no person, in his individual capacity & on the account of the injury which he receives as an individual of that community, can prosecute the offender for the public injury. Tho, if by such public offence any individual suffer a special injury, he may sue for his own private redress. When an individual sues for the redress of a private injury suffered from a public offence he may offer the penal statute in evidence in his own prosecution. If the penal stat' afford a remedy to both the public & the individual the public penalty is of course inflicted on conviction by the prosecution of the individual. In qui tam actions if the individual withdraws his action in Court, the public officer must assume the prosecution & recover for the public. If the qui tam action be privately withdrawn the public officer, on discovery may

institute a new action against the offender. Conviction on a qui tam action is a good bar to a public prosecution for the same offence. If the prosecutor in a qui tam action, recover judgement; he may remit his own share of the penalty, but no part of that which belongs to the public. Fraud practised by the prosecutor, in a qui tam action, does not defeat the public remedy. As if he delays the prosecution to screen the offender from punishment, still the stat of limitations does not run against the public.

2 Sid. 403.

If in a popular action any number of confederates be connected, only a single penalty is recoverable. On penal stats not thus open to a private prosecutor, if an action be brought by the public & a judgement obtained against a number of confederates, each one must pay the whole penalty inflicted by the stat. The reason assigned for the distinction between the two cases is that actions of the former class

Ro. Ab. 180

Salk 182
Poy 62-52
Cowp. 610

Note. The true distinction is this, when the offence is in its nature single & cannot be severed then the penalty shall be single, because the several persons are engaged in it, yet they are all guilty of the single offence a single act. But when the offence is in its nature several, & where any many be separately guilty, they shall suffer severally. Cowp. 511

Persons capable of prosecuting on state are joined on contracts, those of the latter on torts. For crimes are several, and contracts joint.

The distinction between a penalty & a forfeiture is, that the former is given to one or to any person, the latter to the public.

If an action be brought on a contract required by stat to be in writing, the contract must in some cases be declared to be in writing, in others it need not. The Rule by which we are to determine when it is & when it is not necessary thus to declare is this.

If at com law the contract on which the action is brought was good & valid without being reduced to writing it need not be declared to be in writing; But if writing was necessary to the validity of the contract at com law or if there was no com law on the subject, it must be declared to be in writing.

It is a gen. rule that stats cannot have a retrospective operation. In the construction of Eng. stats there are many exceptions to this rule. If after the commission of an offence malum in se the law by which it was punishable is repealed & a new one substituted; the offender may be punished by the latter. If the act be not an evil in itself, it cannot be punished by a subsequent law. As in cases of perjury &c.

2 Mod. 310

2 Sid 136
2 Sim 270
1 Salk 198
2 Ray. 1352
Pow. on C. 245
Dyer. 27.

Persons capable of coventing on Statute

If a man covenant to do a thing lawful at the time of making the covenant, & a subsequent stat. under the act unlawful, it is holden that the stat annuls the contract. This is a litigated point. A covenant not to do a thing lawful is altho multiplied by a stat. subsequent making the doing of that thing a duty. But if there be a covenant not to do an unlawful act, which is unlawful at the time of making the covenant, a subsequent stat. rendering the doing of that thing lawful does not the obligation of the covenant.

If a stat. repealing another stat be itself repealed, that which first exists is, ipso facto, revived.

If a stat. invests a body of men with power to transact certain business by a majority, & constitutes a certain number a quorum of that body; a majority of that quorum, however, for purposes, is not able to act for the whole in a manner which shall bind them. This point is not settled in this state.

The construction of stats belongs to the Courts; to judge of fact is the province of the Jury. In the case of a special verdict if it be possible that the facts found by the Jury may be true & yet the Deft be innocent, the Court cannot infer his guilt; but if according to the facts found the Deft. ~~may or may not~~ must be guilty, the Court may say that the Deft is guilty. The rule of law is such, that the same degree of testimony which is sufficient to authorize a jury to find a Deft guilty, when the construction of the stat is by them properly understood, is sufficient to enable the Court, in the case of a special verdict, to find the Deft guilty, by comparing the facts found with the construction of the statute.

In the construction of stats the terms void & voidable are frequently confounded. When the stat. declares void a contract or transaction which relates to persons situated exactly like those who are parties to a contract or transaction which was before only voidable. the term void is considered as intended for voidable. But if the

3 Co. Rep. 85. b.

Laws of Merchts & Com Law compared in

contract or transaction thus declared void by stat be not thus circumstanced, it is construed absolutely void ab initio.

Some Principles of the Com. Law & the Law of Merchts. compared.

At com law fraud in the consideration of a contract did not vitiate it, but fraud in the execution did. By

the principles of the Mercantile law the contract is vitiated by the least imposition in any particular. The Courts of Chancery have adopted a similar principle. The S. Court of Connecticut in Litchfield County adjudged fraud in the consideration sufficient to annul the contract, tho the decision is contrary to the com. law.

Black Reports 1235

Vid. ~~1685~~ 255

If one of two joint sureties is regularly put into prison for non payment & is discharged with the consent of the creditor, the other, on principles of com. law, is exempted of course from payment or doing that for which he stood a surety. In Mercantile law the rule is otherwise.

Law of Merchants & Com Law compared

3 Burr. 1663

At com. law a consideration is necessary to the validity of an engagement in nature of contract. By the law of Merchants it is not. According to the principles of Merch. law, goods, after a delivery to a purchaser, who is likely to become insolvent, may, on the discovery of the fact, be taken back, when in hand, by the vendor; but at com law they cannot.

At com law, no one can be an involuntary debtor; tho a voluntary creditor is a good consideration for an assumpsit founded on express promise. But according to Law Merchant a bill of exchange accepted for the honor of the drawer will make him an involuntary debtor. For contrary to the com law, gratuities & honorable acts may be made a good consideration of a contract. As in the case above of accepting of a bill of exchange for the honor of the drawer.

For Merchantile Law parol testimony is admitted to vary or invalidate policies of insurance, articles of agreement &c. A practice unknown to the common Law.

By the law of merchants a Mercht who has the goods of his debtor in his hands may retain as many of them as will satisfy his debt. By the com. law he could not do this.

Of Husband & Wife.

I. Of the consequences of marriage as it respects the Husbands rights to estate of Wife —

The general principle by which the law in this branch of the subject is governed, is founded on the duty of the husband to maintain & protect the wife — The property is, therefore, only so far his, as is sufficient to enable him to discharge this leading duty.

1. Of the Wife's personal property in possession. —— The absolute property of this description of property is by marriage absolutely vested in the husband. And if he dies before the wife, it passes to his executors or administrators.

Co. Lit. 351

2. Of the Wife's personal property in action

Tid. 307
1 Ord. 342
Moore 342
2 Mod. 186.

Of this the husband may, during the life of the wife, dispose at pleasure. If, while the wife is living, he exercises his right of ownership & reduces it to possession, she is totally & forever divested of her right to the property. But if the husband neglects to make any disposition of the property, or to reduce it to possession, or exercise any act of ownership over it during the life of the wife; at her death, he loses all title to it & it passes to her representatives. Some Eng. authorities, however, consider the husband as the next akin to the wife & in this way entitle him to her choses in action at her death. From the principle that the husband must reduce the choses in action of the wife to possession to entitle him to them at her death, results another obvious principle, that the personal property of the wife, in action cannot be disposed of by the will of husband; but in the event of his death, he having made no disposition of it during his life, it remains entire to her.

3 Atk 526
1 Ves. 168

If the husband sues on the obligation of the wife & recovers judgement, they are considered as joint tenants of the judgement. If in this case, either of them dies before collection is made on the judgement, the survivor is entitled to the whole, by virtue of the jus accrescendi – No jus accrescendi in Connecticut.

Note. The stat of Car. 2d gives the husband the wife's choses in action, as the Administrator is not accountable – As there is no jus accrescendi in Connect. if the husband sues on a Bond or any chose in action, & gets judgement it is considered as reduced to possession. Before judgment it is not reduced to possession

* See page 37 M. Dickson contra

3. Of the Chattels Real of the Wife.

Co. Lit. 46 351

1 Rol. 344

Over them the husband has a more extensive right than over the wife's choses in action. All her chattels real are liable for the payment of his debts; her choses in action are not liable. Of the former he is by the marriage joint tenant with her; but he has a right to dispose of them at pleasure. On the death of

either the whole remains, by the *jus accrescendi* to the survivor. Therefore neither of them can devise the chattels real during the life of the other. Tho, the husband, while both are living, may dispose of them by sale, yet they are not subject to his debts after his death.

See next page

4. Of the Wife's real estate.

Of this the husband has the sole usufruct. He is unable to alienate it; the rights of alienation not being considered as necessary to enable him to fulfil the duties of marriage & protecting the wife. At her death the fee vests in her heirs; tho if the husband has had by her a child born alive & capable of inheriting the estate, he is entitled to a freehold for life out of the fee by the courtesy of England. These are principles

R. & W.

of com. law from which our Courts in many instances deviate. By the Stat. of Henry 8th the husband and wife may lease her lands for 21 years or three lives. No such statute exists in Connecticut. But in this state the husband & wife may alienate her lands. It would seem therefore that a lease would bind her here, if made by the husband with her consent.

In Connecticut the goods are personal being vested in joint tenancy, it is presumed that the chattels real of the wife would not at her death vest in the husband.

If after judgement recovered by the husband & wife on her chose in action & before collection the wife die, the husband cannot, in Connect. Mr. Reeves supposes, hold the property, ~~the~~ the right survivorship being here rejected. In this case the husband has indeed the right of collection; but must account to the representations of the wife for what he receives. If after judgement thus obtained & before collection, the husband die the whole will enure to the wife by virtue of her prior title. quære de hoc

Twenty five years ago it was determined in the Superior Court of Connect. that the husband should be tenant by the curtesy no longer than during the minority of the issue. But this tenancy for life shall not be defeated in favour of collateral heirs. There has been no later adjudi-

H. & W.

cations on this subject than those abovemen=tioned.

By the gen'l rules of com'n law, if the husband neglects, during the life of the wife, to reduce her choses in action to possession, he loses them forever. But if a settlement has been made on the wife by the husband, it is considered as a pur=chase of all her choses in action; & at his death she may be compelled in Chancery to surrender them to his executors; or, if he survives the wife, he may take them into his own hands & convert them to his own use.

2 Vern. 502. 68

Talbots Cases 68

Cases in Chan. 189

By a stat. of Charles 2 the husband, then administrator to the wife, cannot be compelled to account for her choses in action. And as by another stat. he is entitled to be administrator to his wife, in exclusion of all others, he may

reduce her chose in action to possession, notwithstanding the rule of the com. law, as well after her death as before; unless she disposes of them by devise —

Formerly no Administrator could, by the law of England, be compelled to account for his wifes chose in action. But the st. above mentioned, tho it excused the husband from accounting, compelled all other administrators to distribute the surplus of the personal property of the intestate, after payment of debts, to the next of kin. A statute in Connect. makes it the duty of all administrators to distribute the personal property of the intestate according to the rules prescribed by law. And as husbands are not especially excepted, this supposes that they, when acting as administrators, are, like all others, obliged to account.

Co. Lit. 351

The com. law arrears of rent due to the wife, while sole, are subject to the gen. law respecting her choses in action; but by a Stat. of Henry 8th they vest in the husband at the death of the wife; & on his death go to his heirs. It is, perhaps, a question whether this Stat. is binding in Connect. A feme covert can, at com. law, have no separate property. But in case of a gift to a feme covert, to her sole & separate use, the Ct. of Chancery will protect her in the enjoyment of it; & she may exercise an absolute power over it, as if she were a feme sole. Property may be thus given either before or after marriage.

3 Atk 695

1 Ves. 293 misquoted

Vide further on.

1 Pow. C. 443. 444 It was formerly indispensably necessary, in order to settle a separate estate on a feme covert, that trustees should be appointed to stand seised to her use. But in later decisions, it has been held, that property may be immediately settled in the wife, without the intervention of trustees

2 Ves. 665. 7.

II. Of the Wife's right to her Husband's estate

In Eng. & Connt. if the husband dies intestate, leaving issue, the wife is entitled to one third of

Stat. 47-48 of his personal property, and if there be no issue, to one half. In either case, however, the debts of the intestate must be paid before the distribution.

By the Eng. com. law the wife is entitled to a life estate in one third of the real property of which her husband was possessed during the coverture, unless she has her claim by some act of her own, or it be forfeited by treason committed by the husband, provided she could have had issue capable of inheriting it. According to this law, it is necessary that the wife should in the conveyance of real estate, capable of being inherited by her issue, in order to secure the purchaser against her claim of dower. If the husband dies before age of consent, the wife will be endowed. The wife's right to dower is paramount to the claim of creditors.

Co. Lit. 31. 35 Her right to personal estate is not.

In Connect. the wife is entitled to dower in all the lands of which the husband dies possessed or seized. The stat. indeed makes use of the word possessed: but as possession & ownership are, in this state, often used as synonymous it is not necessary, in order to entitle the wife to dower in any part of his real property, that he should, in the legal sense of the word, be possessed of it. It is sufficient to establish the wife's right of dower, that the legal title to the property be in him. In this state the wife cannot be deprived of dower, either by the devise of the husband, or by creditors. In England if the husband was seized in tail, having never entered, the wife shall be endowed, but not so, if he, having entered, had been disseized before the coverture. In Con. the widow is endowed of all lands of which the husband died seized.

Stat. 47. 48

Wife's right to husband's estate.

Any disposition of property made by a husband in contemplation of death, & intended as a provision for his family, tho' it be by deed, shall be considered as a testamentary disposition. Such a disposition would not, even in this state, bar the wife's right of Dower; because the husband cannot by will deprive the wife of dower; tho he may by deed, under circumstances different from those above mentioned

3 Atk. 393
1 P. Wms. 730

Property, in order to vest in a feme covert, must be given to her sole and separate use. But if it clearly appear, that the property given to the wife was intended for her sole & separate use, no particular form of words is necessary to vest it in her as such. Tho. this is the gen'l rule; yet in some instances, the wife is allowed to acquire an exclusive right to things given her, even tho no words are used wherein of the grantor's intention to vest the property solely in her. This variation from the gen'l rule just laid down is founded on the nature of the property, or the circumstances under which it is given. The husband cannot by his disagreement defeat a right to the sole & separate use of the wife. Diamond given by the husband's father to his daughter in law, at the time of the marriage

Wife's right to husband's estate

are adjudged to be solely & separately her, altho no fiduciar could be made use of to vest the property in her notwithstanding the husband should disagree. A present made by a stranger to a feme covert is considered as her exclusive property. And Trinkets, given by the husband in his life time to the wife, become, on his death, in some instances, her exclusive property, not liable to the husband's debts; but, if they are given by devise it is otherwise. Property given by the husband, even in his life time, to the wife for the express purpose of being worn to ornament her person, is not considered her separate property in the same sense, in which that term is commonly used; for it may still, under certain circumstances & qualifications be subjected to pay the husband's debts. These circumstances & qualifications will be learned from the head of Paraphernalia

2 Atk. 393

How the Wife is to sue & be sued so far as her property is concerned in discharging the costs of suit & her imprisonment.

The wife whenever she is sued & sues must have her husband joined with her; for as she has no property by which she can pay a bill of costs if she fail in her suit, it would be doing great injustice to her opponent to subject him to trouble & expence without the means of being reimbursed. Another is that the wife cannot be separated from her husband & imprisoned for the payment of such costs, such is the regard paid to the matrimonial rights of the husband.

Wife ought to be husband's estate.

In those cases where the wife & husband have been joined in a suit & execution has gone out against them, one cannot be taken without the other: And if after commitment the husband escape, the wife cannot lawfully be detained in prison a single moment but must be immediately discharged. —

Vide

Of Paraphernalia

Rol. 911
Moore 216

That property belonging to the wife, called her Paraphernalia is divided into two kinds. The first of that comprises her necessary wearing apparel & bedding – the second her ornaments jewels trinkets &c

2. Atk 217
2 Atk 358. 395.
Co. Lit. 3-46 contra
Esp. 578
2 Vern. 246

During the life of the husband the paraphernalia of the wife are entirely his property & absolutely at his disposal. But according to modern authorities, by which the law on this point is now settled, he cannot devise them.

The first kind of paraphernalia can in no instance be taken by creditors for the payment of the husbands debts
Quere. Can he sell them?

Paraphernalia

3 Atk 10-4
3 Atk 369

Paraphernalia of the wife are an assets in the hands of the executors of the husband, when all the property personal is exhausted, but not before: and they may not, like legacies, be taken by the Exors, till the other personal estate is exhausted.

Ch. Cas. 344
2 Atk 104

By the Eng. law real estate is not subject to the payment of simple contract debts, tho it is liable for the payment of debts by specialty.

But if a man die having personal property sufficient to pay all his simple contract debts; if the creditors by specialty apply to the personal fund in the hands Exors & exhaust it so far diminish it, or that it becomes insufficient for the payment of his simple contract debts; equity will allow the creditors by simple contract to take as much of the real property as the creditors by specialty if they had called on the heir, might have taken. In this case

the wife's paraphernalia of the 2 kind may also, be taken for the payment of debts; but, like the creditors by simple contract, she may immediately resort to the real estate, & be reimbursed to the amount of what the creditors by
? Vern. 83. 49 specialty have taken of her paraphernalia.
? Vern. 246 A Ct of Chancery will compell the heir to make her compensation. The right of the wife to paraphernalia is preferred to the right of legatees, or the mortgagee. But Mr Reeves, supposes, a settlement
3 Atk. 393 on the wife in bar of demands, would exclude her from a claim to paraphernalia of the 2 kind.

If the Testator creates a
3 Atk 369 trust estate in lands, or charges his lands
2 Atk. 77 with the payment of debts; still his personal property is liable. And if
3 Atk 230 the paraphernalia of the wife be taken she is, in equity, considered as a creditor,
vide 159 & has her remedy against the lands of the testator.

Paraphernalia

In the State of Connecticut, as well as personal, property is liable for the payment of all debts. And since the Exec't, if he should be permitted to take the paraphernalia in preference to land for the payment of debts, could himself be immediately liable to be compelled to reimburse the widow out of the real property of the testator. it would seem

° Vern. 246 improper to permit him to take the paraphernalia, unless with the real & personal property an exhaustion. — or it would be idle to suffer the Exec't to deprive the widow of her paraphernalia & then allow her to call on him immediately for reimbursement out of a fund which was before in his power & with which he might have discharged the debts, for the payment of which the paraphernalia were taken. Even then, however, the paraphernalia are liable in the last resort. Note. The right of the wife to be a creditor, when her paraphernalia have been taken to satisfy debts is not transmissible to her executors.

Vin. 393

If the paraphernalia are pledged by the husband, the wife, not the Creditor, has the right of redemption. And if, in this case, there is a surplus of personal estate, after the payment of debts, the wife has a right to redeem her paraphernalia, even before the payment of legacies.

Of the Husbands liability on the Wife's Account

The Husband is liable, in consequence of marriage, 1st for the Wifes debts. & 2d for her Torts.

1st The Husband is liable for the debts of the wife contracted when sole. But this

His liability on the account

liability ceases when the wife dies, unless the demand attached on him during the coverture of the wife. Nothing can be recov. of him for the debts of the wife, unless he was sued & perhaps unless judgment was obtained during her life. But this latter point is not settled. There is however, no case of a husband's liability without judgmt recovered.

1 Bul. N. P. 351
Co. Car 276
3 Mod 136
Carth. 303
* vide

A Debt contracted by the wife when sole is, as to her, suspended during the coverture. But if the husband dies before it is discharged the wife, if not the husband's death is liable.

The principle, on which the husband is liable for the debts & torts of the wife he enters upon, is that, as the wife by marriage loses the command of her property, & has no means of paying her debts, or securing herself, by pecuniary aid, from arrest & confinement, she ought not to be

Esp. 328
1 Sum. Dep. 486
Croya 71-75.
Salk. 115.
6 Mod 17

Cro. El. 870
Cro. Car. 58
3 Wils. 124
1 Roy. 73
Bunn. 1167.
239. 1272
Blak. Rep. 720
Wile

taken without the husband, by whose legal rights resulting from the marriage, she is thus deprived of the means of personal protection against those who may have claims upon her. In no case therefore, can the wife be taken without the husband, either for her debts or torts, tho he may be taken without her. And if both are taken & the husband ~~is taken~~ escapes, the wife must be immediately liberated.

Esp. 328.
Ro. Jac. 323
Cro. Car. 282

If an action is commenced originally agst the wife while sole and pending the suit she marries & the Pltff get judgmt. the exn goes agst her as a feme sole on the principle that the exn must follow the judgmt. sed quere de hac 1 Sum. 286

If the Husband & Wife are sued jointly for her debts & she dies before judgmt, it is doubtful whether recovery can afterwards be had against the Husband. Mr C. wd suppose that on the gen principle which regulates the husbands liability on the wife's acct, recovery could not be had against him in this case; the wife being no longer in those circumstances, under which the leading principle, before mentioned is calculated to relieve her. If judgment is

His liability on W's account

recovered against the husband & wife and the wife dies before payment the husband is liable on the judgement

3. Nov. 1861.

2. The husband is liable jointly with the wife for torts committed by her own role. And the law is the same, if she alone, without the aid, direction, or approbation of her husband, commits a tort during coverture. The husband is liable also, with the wife for most of her crimes as are punished with a penalty, tho she were alone a role; for penalties are recoverable on it. which is a civil process. If she commit the tort in company with her husband, he alone is liable; unless the presumption of coercion can be rebutted by positive proof, that he was either ignorant or disapproved of what she did. And if the wife, by coercion, or the direction of the husband in his absence, she alone is liable.

Hawk. P.C. 3.

Where the husband & wife are jointly liable for her torts; the continuing liable after the husband's death.

1 Sid 203
1 Hawk. 4
2 Strange 1120
2 Ld. 370

The Husband is in no case liable for the wife criminaliter, except in her presence or when the crime was committed by her in his presence & with his knowledge; & then, indeed, the act is considered as the act of the husband, & she excused & he alone liable. In crimes of a higher nature committed by both, both are liable, tho the husband used coercion; for it is considered that the laws of society ought to have a greater influence over a conduct than any coercion which the husband is capable of using. - If the crime is committed by her alone, she alone is liable.

Ved. 105. 341

2 Burn. 1679
1682

Of the wife power to bind herself by her own Contracts

It is a gen. rule of com. law, that a feme covert, in no instance, can make herself liable by her own contract, tho' she may, in many cases, bind her husband. The grounds on which this maxim is founded are two 1st That the law has either deprived her of her property or disabled her to dispose of it. 2 by That the husband right to her person is paramount to all other considerations mere civil. Mr Powes seems to have devised a reason why the wife should not be liable on her own contracts, viz, That she may have been coerced by her husband to enter into them. Decr 5. 1797

But as Ds of Chancery have of late allowed a feme covert, to hold a separate property, it is now well established by modern adjudications,

1 Vesey 190
2 Atk 379
1 Brown in Chan 16

W's power to bind herself

4 Black 53
9 Wm 1 4

that she may, when she is living with her husband, bind her property to the extent of that property, but no further. Yet, even in this case, her person cannot be taken in execution, because if it could, the rights of the husband would be infringed. The law, however, will not, even under these circumstances, sustain an action against the wife. Tho there appears to be no sufficient reason why they should not.

If the husband is banished or is an alien enemy, or is transported, the wife is considered as a feme sole, and is, like any other person, liable to arrest & imprisonment; for in these cases, the rights of the husband to her person having ceased, it cannot be violated.

W's power to bind herself

1 Term Rep. 5. When the wife leaves the husband, under articles of agreement & she has a separate
Pons. on Cont. 81 maintenance she is liable to the extent of her contracts, even at com law. The ground on which this doctrine may be sustained
Mr Pneiro supposes to be two-fold 1st That having a separate property she is in this, an
Salk. 116 in all cases liable to the extent of that proper-
Esp. 126 -ty: & 2ly That in the case of separation by agreement, the material rights of the husband are at an end, & therefore cannot be violated by her liability to any extent

If a wife, living with her husband, levies a fine on her estate; he may, during her life, defeat it; tho she cannot. But he can
Co Lit. 3. 356 not defeat a gift to her separate use; nor can he defeat a devise or descent of lands to the wife; but a purchase on condication he may defeat. And since in Eng. the wife cannot make a conveyance of freehold to commence in futuro, & her personal estate is wholly the husband's; she can

Wife power to bind herself
in no instance dispose of her property;
except such as is settled to her sole &
separate use, without the consent of her
husband Query: Can she not devise in trust,
in action? . . . . . .

vide 75

But as a freehold may, in
connect, be granted to the immediate
issue of any person in esse, even tho'
such issue be unborn, it would seem,
that a feme covert might here convey, by
deed a freehold to commence in futuro,
without consent or intervention of her
husband; In this case however, the
conveyance must be so framed, as not
to interfere with the husbands legal
right to her estate. This doctrine has
not, as yet, been established by any ad-
judication.

It has been settled in this
state that a feme covert may make
a Devise. See next page for fraudulent conveyance

vide 95

Of the Wife's Power to bind the Husband.

The general principle, on which the power of the wife to bind the husband by contract is founded, is, as laid down in the Eng. law, his consent express or implied. This principle, tho rational & sound as far as it extends, is, in fact, too narrow to warrant all the consequences drawn from it. For, in many instances, where the husband expressly dissents from the contracts of the wife & his dissent is capable of positive proof, still he is liable. He is bound, forsooth, at all events, to provide for his wife necessaries; or if he refuse to do it, she may procure them & make him liable for the payment. This principle is, therefore, insufficient.

2 Vern. 17
1 Str. 408

Note. Voluntary conveyances made by the wife before marriage are, sometimes, fraudulent against the husband. Not so, when made to provide for children by a former marriage. Nor when, being made for a consideration, the husband was ignorant of the fraud.

W's power to bind the H.

The true principle which governs under this head, appears to be, the obligation the husband is under, in consequence of marriage to provide for the wife such necessaries & conveniences as are suited to her rank & condition in life. This is the import of the term necessaries.

The wife may bind her husband in the following cases — 1st where the express consent of the husband is given before the contract — 2d where his express consent is given subsequent to the contract. 3d when the wife usually provides necessaries for the family & the husband has made it his practice to pay for them. 4th where necessaries have been provided by the wife & come to the husband's use, or that of his family. It is true that, in the three cases mentioned, the liability of the husband may be founded on his consent, express or implied. But there are many cases, in which the husband would be equally liable, even tho all presumption of consent on his part is completely taken away.

1 Ld 120. 126
109
1 Roll. Ab. 351
1 Salk. 118
2 Vent. 155
Strang. 1214

Wife's power to bind her H.

1 Ed. 129. Esp. 124
4 Burr. 2078

If a Husband turn away his Wife, he is, at all events, liable for her necessaries.

If a wife leave her husband & live with an adulterer, the husband is clearly not bound by her contracts. If in any case, the wife depart the husband without sufficient cause he is not, Mr Prior supposes, on principle, obliged to provide for her necessaries. Because leaving departing the duties, she has relinquished the rights of a wife. There are no adjudication to establish this principle.

Shang 647
706. 875. 706
Espin. 125
1 Salk. 116.

If the husband provides the wife with necessaries at home, he may prohibit any person, or the public at large, to deal with her; & such prohibition, if the notice be sufficient, shall exempt him from all contracts. For in this case he discharges the duties which the law requires of him as a husband.

1 Lev. 5

But if a husband drive his wife from his house, or if she leaves him for sufficient cause; he is bound by her contracts for necessaries, this made with those whom he positively prohibited to trust her.

1 Ed 127. 129
2. Shang 1214
1 Salk. 118

W. S. power to bind husb.

1 P. Wms 483
Ree. in Chance. 502

The Husband is not liable for the payment of money lent to the wife unless it appear that it was expended for necessaries, & then only in equity.

Esp. 125

If a wife elope with an adulterer & afterwards offer to return & the husband refuse to receive her; she shall, after such refusal, be bound by her contracts for necessaries; for she is still his wife.

1 Salk. 116
1 Bur. 2117

If articles of separation are agreed on between the husband & wife, & the husband allow the wife a separate maintenance, suitable to her rank & degree in life she shall be exempt from all liability under contracts. If her separate maintenance be merely tolerable she shall still be liable.

*vide

Of Agreements between Husb. & Wife

Co. Litt. 57 contra 1 Roll. Ab. Cont. 138. 4-1-1

The general rule under this head is, that all contracts between the husband and wife are void; that those made between them before coverture are, by the intermarriage dissolved.

The reason of this rule, as we are told by the old writers on com. law, is, that the legal existence of the wife is merged in that of the husband during the coverture, & that therefore any contract between them is impossible. To this rule, however, there are many exceptions, & many of the cases which are supposed to fall under this rule evidently appear to be founded on a principle very different from the one above mentioned. If the husband covenant with the wife not to interfere in her estate he is estopped from doing so, & she is not left to her covenant.

At com. law no contract between husband & wife concerning personal property is valid, because the com. law recognized no right in the wife to hold personal

property. And if the husband should give
3 Atk. 393 a deed of land directly to the wife, it would,
at com. law, be void. In Chancery the
3 P. Wms. 357 rigor of the law in this respect is greatly
relaxed

vide

But a conveyance made by the
Co. Lit. 112. 187 husband to a third person to the use of
the wife is valid, even at com. law. And,
as the stat. of uses executes the fee in the
person who has the uses, the husband
may now virtually make a direct conveyance to his wife by deed; the deed of conveyance vesting the uses & the stat. immediately vesting the fee. Query, Does not this stat. annul conveyances to the use of the wife as it did devises of trusts?

Pow. on C. 444 Notwithstanding the preceding rules, if
2 Ves. 669 the wife has property real or personal,
either to her sole & separate use; her
contracts with her husband respecting
that property are good in Chancery.

Agreements between H & W.

If the husband to encourage the wife in duty, engage to allow her some part of her earnings, the contract is good.

3 P. Wms 337

A wife may execute a power given by her husband or any other person to convey an estate. In this case the Eng. lawyers consider the appointee as taking by virtue of the devise of the appointor, tho the person executing the power.

Though it is a general rule that marriage discharges an obligation due from the husband to the wife before marriage; yet if the obligation should be left uncancelled by the husband, & the wife survive him, it is doubtful whether the contract would be annulled by the marriage, or revive, in favour of the wife against the representatives of the husband. The prevailing opinion is that the obligation would be wholly extinguished; agreeably to the maxim of law, that a personal contract once suspended, is forever extinct.

Co. Litt. 371 contra

Pos. on Contracts 481. 548
Hutt 17
Hob. 226
Ca. Jam. 871
Com. Dig. 67
Salk 325. 326
Carth 313. 511.

But if a man give a Bond to his intended wife, conditioned to pay her a certain sum of money after his death: it is doubtful whether it would afford sufficient ground for a recovery in a Court of law, tho it would probably would.

Vern. 481
Vent. 348
Rec. in Ch 237
Rol 948
Ch. 407
Parton. 99
Lev. 99
2 L. 187

In Chancery, however, such a bond would be considered as affording sufficient evidence of an agreement; & without enquiring into its validity as a bond the Court would decree a specific performance. A covenant to leave the wife a certain sum at his death is clearly good at law; this not being a debitum in presenti as the penal part of a bond is. A debitum in presenti is due during the covenantee & so discharged.

Co. Lit. 187

If land is granted to a man & his wife & a third person, the husband & wife will take but one half.

Br. Chan. 6th
Bur. 452
Vern. 386

Articles of agreement between husband & wife on separation will be enforced both at law & in equity: And the husband will in this case be bound to the extent of his contract whatever it be

Agreement between H & W

By the old com law the husband might give his wife moderate correction. But this doctrine is now obsolete. As the law now is, if the husband has beaten his wife, she may by complaint have him bound over to the peace; or if he only menaces her she may in the same way have him bound over for his good behaviour. In the former case he may also be publicly prosecuted for the offence as being against the public peace. But it is not in the power of the wife to prosecute the husband for damages; for, if recovered they would be immediately his property.

1. Hr. 478 To keep the wife from dissipating the property of the husband & from keeping bad company he may abridge her of her liberty.

1 Bur 452 By articles of agreement in which the man & wife stipulate to live separate, the husband loses his power over her person & property, just so far as the articles of the agreement impart & no further: so that any further property coming to the wife by descent legacy &c. will, if the husband's title be not expressly relinquished by the agreement, be so for his, as it would have been, if no separation had taken place. The husband cannot maintain an action for adultery committed with his wife when living sole or separate articles of agreement.

5 Term Rep. 357
1 Bur. 542

2 Rol

If a feme covert alien her property by fine & recovery, the conveyance is valid against her & her heirs. tho the husband may, by dissenting, defeat it. If the husband joins levying the fine or suffering the recovery, the conveyance is valid to all intents & purposes. These are the only species of conveyance, from which the wife may not dissent after coverture. Note. It is doubted by some whether the wife's lands can be conveyed by common recovery.

1 Rol. 346
1 Ves. 224
Co. Lit. 43
Bac Ab. 302

If a wife grants a lease, or disposes of her property by any other than the judicial conveyance just mentioned; after coverture she may annul or affirm the contract. And if she does not, in this case, either expressly or by implication of law confirm the conveyance, the heirs may, after her death defeat it. — The reason given by Eng. Lawyers why the wife may defeat a common, but not a judicial contract, is, that, in ordinary cases the wife is too much under the influence of her

husband, to make a contract indefeasible against herself; whereas in levying a fine or suffering a recovery, the law inspects whether truly or not that this objection is obviated by her private examination. The reason assigned by Powell is still more extraordinary, viz., that the agency of the Court in a judicial conveyance by the wife, implies that the Court consider her not as a feme covert.

Co. Lit. 3a
Co. Lit. 356
Esp. 291
Doug. 435

The preceding rules respecting the ordinary conveyances of the wife are equally applicable to her purchases. The latter may be sanctioned or defeated in the same manner as the former.

1 Rol. Ab. 349

If husband & wife are made tenants in common, the latter may disagree to the purchase after coverture.

3 Co. Rep. 26
1 Rol. Ab. 349

If husband & wife join in a lease of the wife's land, she may after coverture, cavil or affirm it.

The wife may by accepting a jointure before marriage, divest herself of her right to dower. This leads us to some remarks on jointure.

Of Jointure

Dyson C. 54
Black Com. 138
& vide

The qualifications necessary to a jointure are these. 1st. That the estate of which it consists be at least for the life of the wife — 2dly That it be in estate in lands & — 3dly that it be not only a colorable but a competent estate, or an allowance. Of this competency the Court must judge. It ought also to be with consent of the wife before marriage & commence instanter on the death of the husband. Unless a jointure have these properties it will not bar the widow's rights of dower.

The husband may also settle a jointure on the wife after marriage. In this case, however the wife may, if she pleases, waive her jointure & take her dower. But she can in no case have both.

Bac. in D. 180
2 Co Rep 27
4 Rep 45

If the wife agree to accept a gift by devise, instead of dower, she may, after coverture, accept or reject it at her election. And when property is thus given to a wife by devise, instead of dower, the

Jointure

may take both, unless it is expressly mentioned that the devise is intended of all the rest of his property: In such a total disposition is a proof of the husbands intention, that the estate devised to the wife should be a substitute for the dower

It is doubtful whether a dower may not under the Stat of Connect. consist of personal property. Mr Reeves supposes ~~that~~ that it cannot be warranted either by stat or com law. Courts of probate in Connect always endow the Widow of all lands, the ownership of which was in the husband at his death, tho he might have died disseized of them.

Of the power of a feme covert in Connect to make a legal Devise.

Bot. 410
Pro. Car. 106
Tepy 109
Bro. Chane. 10
Ver. 75
Ves. 303. 518
Atk 709
Bro. Che. 205
P. Wm. 126
P. Wm. 82. 316
Mod. 211. 212
Rolls 608. 912
Views H. of E. L.
Vol. III. 307
Henry 6th 3 10
Henry 6th
Pro. Car. 219. 376
Leonard 81
Plowd. 344
Sh Henry 8th
Atk 695

At com law a feme covert might devise whatever property she possessed, which was in its nature devisable. She could not at com law devise her real property; because it was not in its nature devisable. And the stat which has altered the com law, in this particular, does not extend to feme coverts.

But as real property may, in this State be devised; and as the statute which governs, does not exclude feme coverts; & as fee hold estates may be made to commence in future; it is supposed by Mr Rivers that feme coverts may then devise real property so as not to prejudice the husbands curtesy. Mr Rivers ideas on this subject, tho reputed by the Supreme Court have been adopted by the Supreme Court of Errors, but by a majority of one only. On a application for a new trial, they were confirmed by the legislature. A wills Devise is revoked by marriage.

Of the mutual inability of the husband & wife to testify for or against each other.

We gave out under this head in, that the husband & wife can in no instance testify for or against each other. One reason for this rule is that husband & wife are, in contemplation of law, one person; and it is a maxim of round law that, Nemo idem a causam tenetur. And another maxim is that Nemo debet esse testis in propria causa.

In any other instance a person may be a witness against himself, and with the consent of the adverse party, for himself: But the wife of one party in a suit, cannot testify, even with the consent both of her husband & the opposite party. The principle of law is intended to prevent domestic disturbances.

H. & W. cannot testify for or against each other

To the preceding rule there are some exceptions — As 1. It. by the com law of Eng. either was admitted to testify against the other in case of treason. Mr. Rivers supposes that this would not be permitted in Connecticut, such is the difference between our constitution & the constitution of Eng. — 2 ly When the wife exhibits a complaint against her husband for a breach of the peace or to bind him to his good behaviour, she may be a witness against him; & vice versa.

— 3 ly When the husband is prosecuted by the public officer for a breach of the peace in abusing his wife, she may, it has been holden, be a witness against him. But the case in Hutton in which this point is maintained has, in two or three cases been denied to be law. The latest authorities declare the law, in the case in Hutton to be good. This point has never been settled in our S. Court. But the principle, as laid down in Hutton, has been adopted by one of our County courts.

Hutton 115

1 Strong. 633

Side

Of the mode of obtaining redress for injuries done to the wife.

If Damages are recovered by the husband & wife for any injury offered to her; the judgement is in the nature of a debt in actions brought by them as joint tenants: So that, upon the death of either, it will survive to the other. But as there is in this State no jus accrescendi; the whole, Mr Rivers supposes, would survive to the legal representatives of the wife.

3 Term Rep. 631

If a feme covert sues alone, it can be pleaded in abatement only: So if she sues while sole & pending the suit marries.

2 Wilf. 5

In the case of a personal injury done to the wife, the husband is intitled to an action on the case, per quod consortium amisit, distinct from that in which he joins the wife for the redress of her personal damage or injury. The wife in addn to recover damages for an injury sustained by her, must bring an action in her own name joined with that of the husband.

To recover for damage done to the estate of the wife, an action must be brought in the name of the husband & of the husband & wife according to the nature of the injury rec'd.

2 Roll 546

There are some cases in which the wife must be joined with the husband in an action; others, in which he may sue alone, or join the wife at his option, & others in which the wife cannot join.

Esp. 219
Cro. El. 138
Wms. 224
Sid. 25
Salv. 39
Cro. Jam. 501

1. When the action would survive to the wife she must joined.

Cro. El. 183
2 Black Rep. 1236
Salk 119

One reason why the wife may not sue alone in cases of this description, is to save the defendant harmless, who, if he should recover a bill of cost against the wife alone, could not collect it; the other reason is founded on the maxim of law, that the wife cannot be taken as a distinct person, without the husband.

3 Lev. 403
2 Mod. 217
Vernon 396

If a bond is given to the husband & wife it is his & he may sue alone; but he may join the wife & then she may have it by survivorship.

Redress done for injuries done to the 8th

1 Rol. Ab. 347
Cro. Eliz. 537, 700
Co. Lit. 55

1 Vent. 235 this case not reconcileable to the principle
9 Ev. 408
Cro. James 501
Cro. Car. 90

The husband & wife must join in an action to wrest the Deft from her lands — in mixt in her chattels in action — & to recover rents due to her while sole. And if a right of action, which would inure to the husband, accrue during coverture, she must be joined. As in a case of slander — assault & battery — trespass for cutting her trees &c. But in an action on the case for destroying emblements on the wifes lands, she must not be joined; because that would not, on the death of the husband, survive to the wife, but go to his executors. The wife had been joined in trover for her personal estate taken before but consented after coverture. Quere. Is this sound Law?

1 Vent. 261

Esp. 328
Cro. Jam. 323
& vide

If an action is brought against a feme sole, & pending the suit she marries, judgment shall go against her in her maiden name; & she may be taken in execution & imprisoned without her husband.

1. Mod. 15b
1 Salk 114
Vol. 318

If, pending a suit instituted by a feme sole, she marries, the action dies.

1. Mod 15b
Salk 114
Vol. 318
Co. Jam. 501. 442
1 p. 24b
Str. 229
Co. Eliz. 61

2— The Husband may sue alone or joins the wife at his election, when, tho the wife or her estate is the mediatione cause of the action, still the right does not survive to her: as in an action to recover compensation for the wife's labor, or for rents accrued on the wife's estate during coverture.

Vent. 161
Co. Jam. 77. 205
Strang. 229

3— When the wife is merely the suffering cause of an action brot for consequential damages & the interest of the husband only is immediately concerned, as in an action per quod consortium amisit for damages consequent upon a personal injury to the wife the husband must sue alone.

Salk 206
Vol. 456

In what cases the Husband should be sued with & without the Wife

1 Wilf. 149
Co. Lit. 351. 351
1 Rol. Ab. 6.
Salm 313
Esp. 328

1. The general rule, under this head, is, that when the action would survive against the wife, she should be joined with the husband in the action. As in an action for debts due to the wife when sole — for torts committed by her when sole, & for those committed during coverture, without the direction, aid, or knowledge of the husband. If the wife is before, sent, incumbered during coverture, does not survive against her; but if due previous to coverture, it does survive against her.

If an action is brot by the wife alone when the husband ought to have been joined; advantage must be taken of it by a plea in abatement or not at all.

2. But when the action would not survive against the wife the husband should be sued alone.

If a feme sole, marries an action of debt lies against the husband & wife for rents due before coverture; but against the husband alone for that which accrues after marriage.

When H. & W. sued jointly – when alone

Ro. gam. 213
Gilb. 106
Vent. 98

If an action be brought against the husband & wife for a battery committed by them both, the mist may be abated, for the husband alone is liable. And even, if the husband neglect to plead this in abatement & verdict be found against the wife only, the verdict may be set aside, for judgement cannot in this case go against the wife. If a verdict be found against both, may not the Deft release as to the wife?

Ro. gam. 209.

If Husband & Wife have been both beaten an action cannot be brought by them jointly to recover the whole damages. But if the husband & wife bring a joint action for the whole of the damages, & if, in this case, the Deft neglect to plead this mistake in abatement, the husband may, after verdict, on releasing the damages for the injury done to himself, take out execution for the damages given by the Jury for the wife's injury.

1 Vent. 328
2 Show. 29

If the husband & wife are arrested on mesne process in a case where the husband must give special bail, the wife may be discharged on common bail not in final process.

Barns Notes 96
3 Wilf. 124

Of the Celebration of Marriage

Selk. 120. 497. 8

The com. law of Eng. contemplates marriage as merely civil institution. It has also been considered in New England as merely a civil institution.

By the old Stat. of Connect. no person is allowed to celebrate a marriage till the parties are regularly published, or have the consent of Parents. In the new Stat. "and" is substituted for "or" Justices of the Peace, & Clergymen have now the right of marrying in their respective Counties. Consent of Parents is not required

Tab. B. 286 by Stat, if the parties are of age

It is generally held, that if a Clergyman or Justice of the Peace should celebrate a marriage contrary to this Stat, it would be valid, tho the person, causing celebrated the marriage, would be liable to a penalty.

Ibid. 189

But it has been suggested, that, if any person, other than a justice or a Clergyman, should celebrate a marriage, it would be void. This opinion is doubted by Mr Reeves. He supposes that the marriage, in either case, would be valid.

Of void & voidable Marriages

A marriage in Eng. in order to be valid must, by the Stat. of 26 of George 2 be performed by special licence, or in the presence of the Church & by an Episcopal Clergyman, with an exception in favour of Quakers & Jews; tho the practice has been for Clergymen of other denomination to marry; & Courts will not, under these circumstances, suffer the validity of the marriage to be questioned; but consider cohabitation & reputation as sufficient

4 Bur. 2057 evidence of marriage. In an action of crim. con. actual marriage must be proved. So in an action of bigamy

Void & voidable marriages

The validity of the marriage need not be shown by the heir in order to substantiate a claim: neither can it be shown to be invalid or valid for the purpose of affecting any rights of the children, as calling in question their legitimacy &c.

In Connect. the power of marrying is given to Clergymen & justices of the Peace in their respective Counties, & to the Governor & Council in any part of the State. The Clergyman must have been ordained, but he may be of any Denomination, & must have celebrated the marriage during the time of his being settled in the work of the Ministry. Stat. P. 285 It is a common practice for Clergymen to marry out of their respective Counties. The validity of such marriages has never been questioned, tho. it is what may hereafter be the subject of much controversy. Mr Peters think that a marriage solemnized under these circumstances would be valid, adopting the same construction which has been put on other clauses of the same Stat; where it is declared that the intention of the parties must be published & consent obtained before the marriage can be legally celebrated, but if these requisites should not be complied with, the contract is notwithstanding valid & the performer only liable to a penalty.

of the Persons who cannot be united in Marriage –

The gen. rule is, that all persons are capable of being parties to the marriage contract except those who are by the laws of God, or by the laws of the State forbidden, or by nature incapable. The law which in Eng. prohibits marriage on account of consanguinity or affinity depends upon the Stat of 32 of Henry 8th. the com law containing no system on this subject. This Stat authorizes all marriages not prohibited by the laws of God or within the Levitical Degrees

The Canonical Impediments in Eng are consanguinity, affinity, & imbecility. The impediment of precontract having been abolished. In Connect precontract is no impediment

Blackstone 434

All persons linearly related are forbidden to marry

Swing. 220

The gen. rule for ascertaining the collateral degrees of consanguinity & affinity within which marriage is unlawful, is, that

Persons who cannot be united in marriage

Yang. 223. 2 18
Co. Eliz. 228
Hob. 181
1 Salk. 121
1 Rol. 360
Carthew 271
4 Mod. 182
~~1 Rol. 340. 357~~
~~Co. El. 358~~
~~Pl Com 3 12 b~~
~~2 Bri~~

no man may marry his next collateral kins-woman, or the next akin to his next lineal or collateral relation, and vice versa. This rule is founded on the construction given, by the Eng. Courts, to the Levitical Law. In computing these degrees the rule of the civil law is adopted. But the issue of marriages within the prohibited degrees are legitimate unless a divorce takes place during the lives of both parties. Courts of Law will not suffer an enquiry to be made into a marriage, after the death of either of the parties, for the sake of bastardizing the issue; tho they will to punish the unmarried.

1 Rol 340. 357
Co. Eliz. 358

If the parties to a first marriage, still living, contract & form a 2 marriage such 2 marriage is void ab initio.

5 Co. Rep. 98
1 Salk 121
1 Rol. 360
4 Mod 182
Carthew 271

The age of consent is 12 in females, & 14 in males. If married before that age either of them, after arriving to the age of consent may disagree to a confirmation of marriage; but if neither disagree the marriage is binding. If one be under age of consent & the other of the age of consent, the one under age of consent agreeing to the marriage will bind the other.

By Stat in Connect a man may marry his cousin

Of Divorce

Black Com. 3 438 &c

Divorces are of two kinds; a vinculo matrimonii et a mensa et thoro. In the former case the issue is illegitimate; in the latter, it is legitimate.

Cro. Car. 298
Salk 115
Vin. 261

How property is affected by Divorce see the authorities in the margin

Co. Lit. 235
Cro Car 462

Causes of Divorce a mensa et thoro are three – 1 Adultery – 2 Extreme cruelty – 3 Well grounded fears –

Salk 123

If after divorce a mensa &c a child is born it is presumed to be illegitimate. But in case of voluntary separation it is presumed legitimate.

Parliament then, of late Divorced a vinculo matrimonii, for adultery, but the spiritual Court cannot.

Of the Law in Connecticut

In this state the marriage contract is, within certain degrees prohibited by Statute, which degrees intended to be the same as the Levitical Law. If within these degrees the

marriage is not only voidable but absolutely void. If so the issue must also be illegitimate.

By a stat of this State, a man may now marry his wife's sister & vice versa.

The Superior Court of this State can grant no other divorces than that of a vinculo matrimonii; & for no other causes than — 1st for fraudulent contract, which comprises probably all flagrant impositions — 2d — Adultery — 3 — three years absence with a total neglect of marital duties — 4 — seven years absence unheard of. So if a person is gone on a voyage, commonly performed in three months, three years & not heard of, or if heard of, in circumstances which confirm the idea of his being dead, the wife might lawfully marry again.

Stat of C.

If, in case of seven years absence unheard of on one part, the other party marries without divorce, on the absent party returning, he may annul the latter marriage, but the parties continuing

ch are not punishable. If, in this case, a divorce has been obtained, the bath marriage is not revocable at the will and detain of the first husband.

If in case of divorce a vinculo for adultery, the wife is not the faulty party, she may have dower of her husbands estate. In this case the Supr Court may also immediately grant her a part of the husbands estate not exceeding one third. And, if there is no real estate, the Court may make a valuation of the husbands personal property & give to the wife one third of that. Such a grant by the S. Court has been sanctioned by the S. Court of Errors. When the property lies in lands & is of such a nature as that the Court cannot come at it, the court will, sitting as a Court of Chancery, affix a penalty on the party which will compell him to set off the proper proportion of his estate.

On a Petition for a divorce in case of adultery, no evidence coming from the wife is admitted; nor from the husband, if he is in fault.

Divorce

The Legislature of this State may grant Divorces either a vinculo matrimonii or a mensa et thoro at their election, for the following reasons — 1 — Propter sævitiam — 2 — propter metum

1 Rob. 240
1 Hag. 112

The marriage of an Idiot has lately been holden to be void. This seems not have been formerly the opinion —

# of Parent & Child
including Guardian & Ward

of the liability of Infants criminaliter

By the word child is especially meant in law, a minor or one under pupilage.

No child under seven years of age can be punished for any crime. At 14 he is generally as liable as any other person for torts & crimes. Under 14 & above 7 he is or is not liable as the case may be; but the presumption is said to be in the child's favour during this period.

1 Bl. Com. 464

1 Saunt. 4

1 Hale P.C. 678

Infants, if not named are not punished corporally under a penal statute inflicting such corporeal punishments, unless the nature of the crime is such as exists at, or is made by com. law, & is corporeally punished e.g. gr. If a Stat. makes an offence felony & inflicts corporal

Parent & Child

punishments, infants are liable. Not so if the Stat. merely prohibits an act, not expressly punished at com. law, and inflicts corporal punishment.

In an action of slander a minor is not liable to Mcy, tho' he is for all other torts at 14.

Of the Contracts of Infants

In general no person can contract till 21 years of age. The age for choosing guardians is 14 in males & in Connecticut females may choose guardians at 12 years. A minor may be an Executor at 17, but no person can be an administrator till 21. Full age is 21 years in both male and female. A male infant of 14 may, if proved of sufficient discretion, may make a testament of personal property, & a female at 12. In Connecticut the age at which both males & females are capable of making wills is 17 –

See Stat.

Sal. 276. 3. Mod. 210
Lev. Jam. 320. Sid. 129. 446
3 Bac. Ab. 140
3 Mod. 248.
Show. 171. Lev. 169

If an adult person contract with an infant, the former, according to the current of authorities, is bound, but not the latter.

Contracts of Infants

Selw. 268
C. Lit. 172
1 Rol. Ab. 729

For necessaries Infants may bind themselves & Parents. These are good, as general helps for instruction. But it is requisite, in order to bind the infant, that the things for which he contracts, be absolutely necessary for him & the time of the contract. Note. If the Executor or Administrator of an infant, being his bailiff, do not sue within six years the infant is bound by the Stat. of Limitations

3 Salk. 309

But if an infant is under the actual government of a Parent or guardian; and that government is duly exerted; he cannot bind himself even for necessaries. An infant can bind himself in the following cases - 1 - If he has no parent or guardian — 2 — If having parent or guardian & being under him, he is not duly governed & provided for. For the ground on which an infant may, in any case bind himself, is that he may not suffer want or be destitute of necessaries.

1 Bid. 216. The Stat of Connect. is supposed by many to vary from the com law, as it respects infants & their power to bind themselves Mr Reeve thinks it does not

of the mode of contracting by Infants.

If an infant give a bond even for necessaries he may avoid it; but on principle he ought still to be bound on simple contract. If he gives a single bill for necessaries, he is bound by it; by a negotiable note actually negotiated he is not bound; if it remains in the hands of the original payee, he is bound. on an informal compute stat; nor by a bill of exchange

Co. Lit. 172 a
Bullen & L. 182
Co. Lit. 172 a 290
Sum. 24. 40
Carthew 160

The governing principle, by which we are to determine when the manner of the infants contracts is such as to be valid, Mr Reeves supposes to be this: That the instrument or obligation must be such in its nature, as that the consideration may enquired into; otherwise it is of no obligation, potius validity. This rule is evidently in conformity to the purpose to be answered by making the contracts of infants under certain circumstances void, when for necessaries. The purpose or reason of it can, in justice, be no other than that of securing them from imposition.

The rules adopted by the Courts on this point may all be made to quadrate with the principle above laid down. In this, the consideration of a single bill cannot be examined; it would be examinable the principle being once established. For originally a

single bill acknowledge no debt, but only bound the obligor. For the items of an infant's account can now be gone into, tho formerly they could not. The consideration of a negotiated note cannot be enquired into except for illegality, because the practice would injure trade. The consideration of a negotiable note, if not negotiable, may be enquired into.

Co. Lit. 583
2 Bac. Ab. 134
Co. J. 560
Bth. 151
Salm. 361

In strictness, an infant can hardly be, with propriety, said to be bound by his contracts; for he is bound not by his express agreement but by a contract implied in law. Nor, as the ex may be, is he bound to the extent of his contract, but to the real value of the necessaries.

Notwithstanding notes are, in this State, considered as specialties Courts have enquired into the consideration of them, when given by minors

Mode of contracting by Infants

Bills of Exchange do not bind minors because the consideration cannot be examine

1 Salk. 276. 286
Hoige

Money lent to an infant will not subject him, even when to purchase necessaries; but the lender must actually lay it out for him.

Co. J. 194
5 Mod. 358
1 Ray. 344
Strang. 1083

If an infant purchase articles, or which are in the line of his business; he is not holden by his contract.

3 Dun. 1794
Co. Lit. 172 a, 315 a.

If an infant do any act which Chancery could compell him to do; he is bound by the transaction: as if an infant heir set off dower to the widow. Such a transaction, however, he may, on arriving at age have examined; but if no fraud appear it is valid against him. Errors, if any appear would be corrected, but could not, if not very flagrant, wholly invalidate the contract

Examples of cases
Contracts of Infants void or voidable

The contracts of infants respect-
ing personal property, are generally void-
able, not being for necessaries. If they
respect real property they are generally
void. Neither branch of this rule is true;
the want of a delivery of the property making
a principal difference in both cases.

1 Ba. Ab. 182
1 Bur. 556
2 Strang 958
1 Mod 137
3 Bur. 1794
vide

Contracts of Infants void or voidable

1 Strang. 690
2 Term. 203
3 Bac. Ab. 187

A promise by one of full age will bind him to a contract made during infancy, when the contract is voidable only. Even when the special contract is void it ought on principle to bind him, on the ground of the simple contract or moral obligation. Nov. Quæ. If the contract be a voidable specialty?

Esp. 164

3 Burr. 1794
3 Ribble 569

The gen. principle by which we are to determine, when a contract made by an infant, is void & voidable, seems to be this: If the infant is sufficiently guarded against injury, the contract is voidable only; otherwise it ought to be considered as void.

Bro. Ab. 502
Dyson C. 33

Another, but less perfect rule, which is laid down is this: That when there is the least semblance of advantage to the infant the contract is only voidable. but when there is none it is void. This distinction is disapproved by L^d

3 Burr. 1806

Mansfield

1 Bul. 86. 780
Lutch 10
1 Mod 137

Another rule which has been adopted is, that where the contract of the infant is merely executory; or where, it being executed, the thing contracted for has been delivered by him, the contract is only voidable. Otherwise if the contract be executed & the thing not delivered.

1 Strang 171
3 Mod 248
Cro. Car. 502
2 Ray. 848
1 Vent 51
1 Sid 169
1 Lev. 169 a 186

When an adult contracts with an infant the former is bound the latter is not. And if in this case the infant has received the consideration & afterwards avoid the contract, he is not, it is holden, bound to refund what he has received. This opinion is hardly tenable on principle. It presumes that the infant ought be obliged to refund by an action of trover, or an assumpsit, at law implied ex delicto of the infant.

A minor & parent may both be liable for necessaries furnished to the former. But if a parent makes an express contract for them the infant can never be liable

Contracts of Infants void & voidable

12 Vin. 203
1 Ld 158. 258
Lev. 169.

Infants are liable criminaliter for p
but the current of authorities would lead
to believe that they were not liable civi-
liter. In all other cases where a person
is liable for torts criminaliter he is
a fortiori liable civiliter; not indeed,
on the ground of contract, but on
the grounds of fraud. In the cases last
mentioned a Court of Chancery
will interfere & compell the infant
to do justice. Courts of Chancery
will enforce a contract against an
infant which has been obtained by him
fraudulently.

1 Vern 132
Shang. 124

1 Vern. 132. 224

If an infant sell goods & do not
deliver them, his contract has been consid-
ered void, & he may bear trespass against
the vendee for taking them. But if the
infant deliver them the contract is only
voidable & an action of trespass will not
lie.

3 Ld. 1798

3 Burr 1799

The infants are bound by a decree in Chancery; yet that Court allows them six months after they arrive at full age to shew cause against the decree, if any they have. And if sufficient cause is shewn the Court will set aside the decree.

1 P. Wm. 558, 9
5 Mod. 368
Contra

For money borrowed and actually laid out in necessaries the infant is liable in Chancery, but not at law, unless the lender himself laid out the money for necessaries.

Contracts capable of being affirmed by the infant, when he arrives at full age, are in their nature void but not voidable

2 Vent. 203
Cro. Jam. 320
1 Rol. Ab. 731

Any act of the infant, after he arrives at full age, shewing that he intends to waive the advantage of infancy, affirms the contract

Moor 76
Co. Lit. 380

An infant, having made a conveyance by fine, may, during his minority waive it, but afterwards he cannot.

Contracts of Infants void & voidable

2 Ch. 572

4 Cap. 125

Settlement by an infant, after he arrives at full age, may be avoided, but it is only voidable. She may also avoid it. Such a minor. The same is true of a lease reserving rent. A bargain & sale of land an infant may avoid by entry —

Extract cases in Equity.

A marriage settlement by a minor is valid.

1 Ba. Chan. 52

If a minor of the age of 17 devises money, or personal property to pay his debts, the devise shall be considered as a ratification of them; & his Exect shall be compelled to fulfil them.

1 Eq. Ca. Ab. 187

If a minor executes a power of Attorney to confess judgement; if execution issues, the Eng. Courts will call the parties together & on proof of minority will grant a bill against the execution. No such practice is known to our Courts.

Nad. Rep. 576

Mr. Roeve supposes that the infant must, in our Courts, in order to obtain redress consider all the proceeding a nullity & bring trespass against the opposite party.

A widow made a lease of land belonging to her infant children — one of them at 19 affirmed it. Ten years afterward they all arrived full age & attempted to invalidate the contract but the Court affirmed it.

1 Atk. 489

an Infant Executor above 17 is in same respects privileged; for tho all personal acts bind him; yet in case of gross imposition on his part & imposition on the part Chancery will grant relief.

Hawk. 1.67 For treason & felony infants are subject to the same punishments that adults are. But infants are not subject to corporal punishment annexed by Stat. to any crime unless specially named: Yet corporal punishments for the same offence or crime may be inflicted on them in the same manner as on others adults.

For crimes arising from negligence infants are not punishable.

1 Ves. 209. An infant cannot execute a power to convey real estate.

2 Vern 700 Abr 177.637 Co. Lit. 423 1 Sid 153 9 Ray. 163 Carthew 309 Pur. Ch. 53.60 2 Vent 188 Rel. Ab 104.188 An infant in ventre sa mere is considered to to many purposes, as in esse. By com law a devise to an infant in ventre sa mere could not take effect unless it was considered an executory devise. By Stat 6 W. & M. infants in ventre sa mere are now considered in esse. But such an infant cannot take directly by deed

3 Burr 755, 6 A Minor may hold some offices; others he cannot. To this point see the following authorities. Co. Lit. 172 — Latch. 169 Salm. 528 — Hob 325 — 7 Co. Rep 48.97 a Co. Rep. 4. Infants may in some cases hold ministerial offices, but not judicial. Its one infant may be a Gaoler & for an escape would be

3 Mod. 222 liable in an action of debt or on the case

It is a gen. rule that infants shall not suffer by their own laches.

2 Vern. 342, 8. 295 If one enter on an infant's lands & commit waste, he may be made to answer, as trustee to the infant, to a bill in Chancery. In permissive waste an infant is liable, tho not for a non feasance.

The right of entry on lands is not taken away from infants or from adults

In the State of Com. the right of entry on lands is never lost as long as the right of property exists in the owner

Miscellaneous Cases respecting Infants.

An Infant lessee is, like an adult, liable for waste. An infant, holding an estate to which a certain duty is annexed, & a collateral penalty for non performance, can be compelled to discharge the duty; or if he fails to forfeit his estate as the case may be, but is not liable for the collateral penalty.

Co. Lit. 246
2 Vern 560
Vent 201

According to the current of authorities, infants are bound by the statute of limitations, unless excepted. See Ex. 2. If an Executor, Administrator or Trustee for an infant does not sue within 6 years, the infant is barred by the Stat. of Lim.

3 Ch. Rep. 309.

An infant is bound by a condition annexed to a grant, legacy &c unless the condition is in its nature a penalty: For there he is not bound. An infant may receive interest on his legacy, after non payment for a year without a demand.

3 Co. Rep 44
1 Vent. 201
Cro. Ch. 454
2 Salk. 415

An Infant must not bring his suit in his own name, but by a guardian or prochein amy. He can sue by prochein amy in these cases only.
-1- If he wishes to sue his guardian
-2- If his guardian will not lend his name to sue a stranger
-3-. If the infant has no guardian
And in these cases the guardian or prochein amy is liable for costs.
But in the first case, it is a question, whether the infant is not liable for costs both in law & equity, provided the case goes against him.

2 Q. Wm. 2d 8

When an infant is sued, he must always defend by guardian, or Parent: and if he has neither, the Court will appoint one. All judgments against infants without a guardian are erroneous in fact; that is the error does not appear on record. And in such case, a writ of error is best coram vobis.

Hob. 2bb
Co. Jam. 469

Miscellaneous Cases respecting Infants

If an infant is sued with others & his guardian is not summoned, the whole judgement in Eng. is erroneous. In Connect. a judgmt. thus obtained has been reversed with respect to the infant only. — — — — — — — —

~~Hob.~~ ~~Hob.~~
Hob. 116

If one of several Defts ~~sued on judgment~~, in a suit on a contract, pay the whole Judgmt recovered, he has his remedy against the others: But if the suit be brought on a tort he has no such remedy.

A Bastard is called in the Eng. law nullius filius: And to this maxim the Eng. law strictly adheres; except that no person can marry an illegitimate person within the Levit. degrees.

Lisp. 483 &c
5 Mod. 420
Strang. 925. 1076
Ward. 379

Formerly no impossibility of access during coverture, except in the case of absence extra quatuor maria, could be admitted as proof of illegitimacy: But now any thing which proves impossibility is admitted but proof of improbability is insufficient.

2 Rol. 785
1 Salk 122. 484
Str. 925. 1076

In Eng. if a man after an absence for several years, marries a woman who brings forth a child within three months, or even a shorter time the child is legitimate.

No rule similar to that of extra quatuor maria has been adopted in Connecticut.

Co. Lit. 3. 244.
1 Rol. 357, 8, 9

A bastard tho incapable of inheriting, may purchase by the name which he has gained by reputation.

Co. Lit 244
1 Rol. 357
2 Rol. 43. 4

If a man hath issue bastard eigne and mulier puisne, & the bastard in the life of the father hath issue & dieth, & then the father dieth seised & the son of the bastard entereth as heir to his grand father & dieth seized their descent shall bind the mulier

Of Bastards & Bastardy

1 Bl 381 contra

The maxim of the Eng. law, that a bastard is nullius filius is not adopted here.

To permit a bastard to inherit might tend to disturb the domestic peace of families, & so far as this reason avails Mr Rice supposes, that the Eng. law would be adopted here & no farther. A child born during wedlock is legitimate. The mothers testimony is insufficient to prove the illegitimacy of her child.

The Court of errors in this state has once decided that a bastard cannot be a kin to his mother; but the Court are equally divided

In this state a Bastard has a settlement, where his mother was last settled.

In this state the father and the mother are equally obliged to maintain an illegitimate child. The damages given on an action by the mother against the father are for

support of the child till four years of age. On application to a justice of the Peace by the mother & under oath, the person charged as the father may be bound over to the County Court.

The mothers oath is prima facie evidence & proof against the person charged but not conclusive. The person charged has a right to introduce testimony rebutting the mothers oath. A possibility or a probability of another being the father will not avail the person charged.

The form of the action instituted is altogether criminal – the effect merely civil.

3 Wilf. 18
3 Bur. 1578
x vid
2 Ld Ch.

In addition to the action brought by the mother, her parents may have an action of trespass against the father of the child. The father is also liable for the expense accumulated=ccedent to the suit. The execution against the father expires quarterly for four years; & if the child dies before that time expires, execution may be stopped. But if the expense

of the child's maintainance greatly exceed the sum adjudged to the mother, the father may be compelled to make an additional allowance, and this allowance will, on application to the Court, apply to the subsequent quarterly execution.

It has been a prevailing opinion, that in order to charge the father with the maintainance of the child, the mother must swear it upon him during her travail, but that formality has of late been dispensed with. The judgment given against the father of the child obliges him to give surety for the payment of the damages found, & also, if required, to secure the town from any future expence in maintaining the child.

c. 209

If the mother does not prosecute or if she discontinues the suit when instituted, the town may prosecute for their own security. In these cases it has been said, that the Selectmen may oblige the mother to swear the child on some one as being its father. Mr Reeve thinks otherwise —

If the father after judgment agt him does not find security for payment to the mother, or for security to the town if required, he may be committed as a criminal for not giving bond, and he cannot, in this case, be admitted to the poor mans oath.

Criminal cases are generally not appealable. In connect. an action of bastardy being criminal in form, was originally not appealable. Appeals were, however, afterwards sustained, but according to the latest decision, no appeal is allowed in this action. Trials in this case were originally, by the Courts only; but the parties are now allowed trial by jury.

Depositions in any case are admissible by stat. only. But in cases purely criminal they are never admitted. In an action of bastardy, however, which is criminal in form only, depositions are admitted. In this action bond are not required of the mother.

Of Bastards & Bastardy

Co. Lit. 244
1 Rol. Ab. 357

By the Eng. com law all persons born out of lawful wedlock are illegitimate: But by the civil if the parents at any time after the birth of the child marry this will legitimate the child. Not so in this State.

1 Salk. 123

If there has been a Divorce a mensa & thoro the law will presume the children born afterwards bastards unless access of the husband should be proved - - - - -

Children born of the wife while living on separate articles of agreement are legitimate unless it be shown that the husband had no access - - - - - - - - - - - -

Co. Lit. 123

A child born any time within 40 weeks after the death of the husband is regarded as legitimate & the child of such husband

Black Co. 459

In Eng. the bastard child has its settlement in town where it was born, unless there has been some fraud in the woman's being in that town at the time of its birth. As if she be conveyed there for the purpose of having the child born in that town -

Bastards & Bastardy

Mc Ry: vs. An illegitimate child has been allowed to take under a devise by its mother to all her children.

Of the Relations who are bound to support each other in case they become paupers —

Persons related to each other in the degree from Grand Parents to Grand Children are bound to afford mutual support in case of their becoming paupers But those related in the nearest degree are first liable, provided they are of sufficient ability.

The mode pursued in order to compell those who are liable, is for the Selectmen of the town in which the pauper lives, or any other person to present a memorial to the County Court stating that such a person is in want & that he has relations within the degree mentioned who are able to support him The Court proceed on the memorial by summoning in the persons who are liable & who ought to have afforded support; & then assess each in proportion

to his ability without any regard to what he may have received from the pauper, unless they should in every other respect be equally liable.

Execution is to be sent out quarterly, if the money is not previously at the order of the Court, & it is to be paid into the hands of the memorialists as trustees to the pauper.

In case one of the children has alone maintained his parents, he may have an action against the other children for that part of the support which they ought to have afforded.

It has been determined that a son in law is not liable for the support of the parent in law. This decision was made in regard to policy & domestic tranquility.

Strong 190

By usage, in Connecticut, a man who marries a pauper is liable for the support of her children & in

Persons bound to support their poor Relations

return is entitled to their services. In Eng. he is bound only in case he takes the benefit of their services; or the mother before marriage has supported them. In the latter case it is considered as a debt of the sons. What difference is there in principle, between this case & that of the son in law who is not liable?

Of the liability of parents for the Contracts & Torts of their Children.....

vide
1. Ke. 217
2. Id 256

Parents are in general liable for the contracts & torts of their children to the same extent as masters are for their servants. It is not to be understood however, that the rule of the parents liability to provide for their children, at all events, with necessaries is applicable to masters: for to guardians. An infant not provided for by his parent, may without his consent, & even against his express prohibition, provide himself with necessaries & make the parent liable to pay for them

vide

A suit brot upon a contract either by a child or servant, acting for his parent or master, must be brot in the same manner as if made by the parent or master himself.

The following are the principal cases, in which a parent is bound by the contracts of his child; & which are not contracts for necessaries: - 1. If the child is expressly empowered to contract for the parent, the latter is bound to fulfill.

An infant cannot execute a power of binding the parent over real estate, but when he is a mere instrument & not intrusted he may — 3 - If the articles purchased came to the parents use 4 — . If the child has a general license to transact business for himself.

3. Atk. 695

1 Ves. 298
3. Atk. 700
Co. Lit. 52

If the parent has occasionally ratified & fulfilled contracts made by the child, there is some difficulty in determining how far such occasional ratification shall render him liable: But — 5 — The general principle of discrimination appears to be this: That, if the debts contracted by the child, are of such a nature or that payment by the father would afford good presumptive evidence of his approbation, he shall in future be liable for the payment of debts incurred by similar contracts. But if the contracts of the child

ure of such a nature, (gaming debts for instance), as that payment by the parent would afford no rational proof of his approbation, he shall not, in future, be bound by such payment. This rule has been adopted by our Courts.

Torts

If a child, in the performance of his parent's business, commit a tort, the parent is liable to the injured party.

Note

But if the child while employed in the business of the parent, commit a tort no ways connected with the business, the child alone is liable.

If an accident happen, against which ordinary human prudence should not have guarded; no one is liable for the damages.

A parent may justify an assault in defence of his child & vice versa. But if either have made an assault, which is unjust, the other will not be justified in joining, unless safety of the one assaulting require the interference of the other

Education of Children.

The Eng. law has made it the duty of parents to give their children proper instruction, but there are no regulations to enforce the for instructions or to compell parents to do their duty.

For Connect the Selectmen of the several towns are authorized by law to take children from parents who neglect their education & put them under proper instructors.

The child is entitled to all the property he acquires any other way than by service; but what he acquires by service belongs to the parent. Nor can his earning be given to him by his parent, if such gift would tend to defraud creditors.

If a child has been beaten, he himself is entitled to the damages; but the parent may have an action per quod servitium amisit; & if he has in=

curred any expence in consequence of the injury done the child, he may recover that if it be specially stated

2 L Ray. 1032 contra

The Parent is entitled to an action for debauching his daughter. The original ground of this action was the loss of her service & the expence incurred by her sickness. But, tho these two considerations still form the nominal gist of the action; yet they are not the sole nor the principal grounds of damages. Mr. Rivers is of opinion that a declaration not stating the two grounds mentioned, but the disgrace & injury might now be good. The age of the daughter is not in this case material; but according to the Eng. law she must be at least nominally in the parents service. In Con. actions of this kind have failed, in some instances, where there was no seduction, but merely loss of service

3 Wilf. 18

2 Sent. 353

Wick

2 Sid. 63 contra 55

Education of Children

2 Sid 62

2 Blac. Comm. 140. 141

This action has always been included in the description of trespass vi & armis, tho strictly speaking it is an action on the case. The Parent may have an action on the case for enticing his child from his service - - - - - - - - - - - - - -

2 Term. Rep. 4. 166

Ld May 1032

3 Burr 1878

3 Wils. 18

1 Roll. 373

2 Lutw. 1497

Cro. Eliz. 769. 770

T. Ray. 249

Styles 398

1 Sid. 225

Query. Whether from analogy to the case of debauching, the Parent might not have an action on the case for allurring his child into bad company and debauching his or her morals. In the margin are some authorities on the subject

Correction of Children.

The parent has a right to correct the child moderately; but if he exceed the bounds of moderation, & appear to be influenced by malice; the child may have his action against the parent by his prochein amy. But on the authority of the parent is dispositionary, he is not punishable for a mere error in judgement with regard to the correction of the child. There must therefore be both immoderate correction & malice aforethought in order to subject the parent to an action of Damages. The malice is to be inferred from the nature & the circumstances of the fact; and it will always be inferred when the child is corrected for that which no rational person would think worthy of punishment. The law is the same as to master and servants. Any wickedness of motive constitutes legal malice, whether there is ill will or not.

Dft. Cal. Jet. Hom.

Of Guardian & Ward

The parent is natural Guardian to the child & his estate, but he must account, like other guardians for the profits of the estate. Displacing the parent Guardian does not take away his right to the child's person. Cause of damage to the child's estate, the guardian, either parent or any other person, may be compelled in Chancery to account for the estate before the child arrives at full age. In similar cases, a Court of Chancery may appoint another Guardian in exclusion of the the parent, or oblige the parent to give bonds to secure the child's estate; & in case of refusal the court will displace him. No other person, however, can be appointed Guardian while the parent is living unless he is displaced.

Co. Lit. 88
Moor 738
Carth. 385
5. Mod. 223.

The parent has no right to expend any part of the child's property for his maintenance. Beyond necessary maintenance, protection & education, he may charge the child's estate, provided the purpose be laudable & for the benefit of the child, & the means prudent: As for extraordinary education, &c

2 Vent 253.
3. Atk 399
489

The power lodged in the hands of the Chancellor in Eng. over the conduct of Guardians, in this State vested in the Court of Probate.

The Guardian must pay interest for the money of his ward, unless he can make it appear that interest could not be produced from it, or could not be procured for it.

If loss appear to have happened to the property of the ward in the hands of the Guardian by mere accident, & no fault or improvidence on his part, the ward is without remedy & must bear the loss.

When Probate appoint a guardian for a child under the age of choosing, the Guardian thus appointed continues of course until the child, after attaining the age for choosing, chooses one whom Probate approves. If a child, of legal capacity to choose, refuse to make a choice & have no Guardian, Mr Rivers supposes that Probate must appoint one without his choosing.

Co. Lit 88
2 Rol. 40

Guardian in socage continues till the ward is of the age of fourteen. Guardian in socage may bring an action in his own name for a trespass on his ward's estate. In this particular he differs from other Guardians. When there is Guardian in socage it is necessary, if the minor has personal estate, to appoint another guardian. The same person who Guardian in socage may be appointed to the other Guardianship.

2 Rol. 41.
Co. Gum. 98
2 P. Wm. 122

1 P. Wm. 703

Guardian & Ward

Testamentary Guardians are those appointed by the will or deed of the parent. These superseded guardianships in wardage & retain their authority till the minor is of full age. Testamentary Guardians cannot sell their ward's estate. They may be bound by their wards to give bond, & have of they attempt any improper exercise of authority. The power of making by guardians is in Eng. created by statute; but this statute extends only to fathers. By the law of Connect. testamentary guardians are not known.

2 Ves. 129: 135
1 P. Wms. 703

Gang 179, 180
2 P. Wm. 110

3 Ch. 514

Guardians are appointed in Eng. by the Ordinary or Chancellor. Those appointed by either of these officers are always required to give bonds for the security of the ward's estate, & they continue till the minor attains the age of fourteen. By the custom in Connect. a guardian may bind out his ward an apprentice.

2 Ves. 170

A minor having attained the legal age of choosing a guardian, has not the absolute right of choosing whomsoever he pleases; but his choice must be ratified before it can effect, in Eng. by the Ordinary or Chancellor, in Connect. by the Court of probate; and tho' the in-fant's choice will be regarded it cannot be absolute

In Eng., if the father dies, the mother is the natural guardian to her child; then if the Court think it expedient, another may be appointed in her stead, in the case of males but not of females. Both males & females may, after they have arrived to the age of fourteen, choose guardians of their own, tho' mother be living. The law is the same in Can. except there is no such distinction, as has been just mentioned, between male & female, & the age of choosing in females is twelve.

But tho' the mother, on the death of the father is, in Eng. the natural guardian of her children under the age of fourteen; yet she is not of course, guardian in socage, but this depends upon her situation with regard to the socage laws: That is, if the lands can by no possibility descend to her, she may be guardian in socage.

In Connect it is the duty of Probate to appoint for infants who have no parents and are under the age of choosing guardians.

In Eng. an infant mortgagee may, on payment of the mortgage money reconvey the estate to the mortgagor. In C. this power

3 Burr. 1794

Guardian & Ward

is in the hands of the guardian by virtue of State. The guardian here has also power to make partition of lands, held by the ward, in common, coinstanancy &c with those of full age, under the direction of Rebate.

If a creditor of a minor, in order to obtain immediate payment, agree to accept a less sum than is due to him in satisfaction of his whole demand, the minor & not the guardian is entitled to the benefit of such composition.

1 Ven. 486
Cont. 489
Wide

Guardian, in Chancery, is considered as trustee; & whoever takes possession of an infants estate may be charged as guardian or trustee

The guardian having personal property belonging to the infant, is obliged to pay all debts & incumbrances charged upon the minors estate out of such property. This rule is established to secure the infant from any accident, which might happen to his property, if it were put at interest, & the guardian employed in the payment of the infants debts.

The guardian has no power to sell his wards or alienate his lands; but if he does, and takes deeds in the minors name, still the latter

may, at his election, on his arriving at full age accept the lands or demand the money. In the latter case the ward is compellable in Chancery to reconvey the lands to his guardian. If however, in such a case, the infant should die, having made no election his executor may demand & the land shall not go to the heir.

Vern. 103, 4, 5

If is a general rule that the guardian, in accounting with the ward, must pay the principal & interest: Nor is he obliged to pay any more unless the ward money was directed to be laid out in a particular manner, & instead of employing it according to directions, the guardian has used it in some other way to greater advantage; as in a profitable trade to himself. In this case as the minors money is exposed to hazard, he is entitled to claim the profits. In C. guardians are usually compelled to account by action of account

2 Vern. 624

Co. Lit. 88 b

In Eng. by a bill in Chancery.

Guardian & Ward

In such losses to the wards property as could not have been avoided by com. prudence the guardian is not liable

The guardian, unless he is the parent is allowed for the maintainance, education &c of the ward, except the expenses are very unusual & extraordinary. But, generally the guardian has a discretionary power to educate the ward in a manner which he thinks is most proper.

8 Ves

Guardians in C. Ch Rules supposes may account with the Probate as in Eng. with Chancery. But the usual mode is to institute, in case of dispute, an action of account at law as in other cases. In Eng. guardians may also be sued in an action of account; but as Chancery has a more extensive power in compelling the production of papers, & of obliging the guardian to disclose the whole history of his guardian-ship upon oath, it has long been the practice to resort, in the case, to this court only.

2 Sid 1-8

2 Ab. Cas 58
2 P. Wm. 111. 562

With regard to the marriage of minors in Eng. Chancery exercises a jurisdiction which has never been claimed by our Ctrs of Probate

Of the Settlement of Minors

1 Sid 167

A foreigner can never by his own act gain a settlement in England. But if he has children, the place of their birth is their settlement. The law is the same in this State.

Stat of Connect.

1 Sid 169
Strag. 580
2 Ray. 1392
2 Salk. 528

Generally the settlement of the father, or the maintaining parent, is the settlement of the child; & if such parent acquires a new settlement, it immediately becomes the settlement of the child; & by the acquisition of this new settlement the old one is lost. If neither the father nor the mother has any place of settlement, the place of the child's birth is his settlement. A child may gain a different settlement by commorancy; then his derivative settlement is lost. The law in Q is the same.

The father being dead the mothers settlement is the settlement of the child.

Settlement of Paupers

1. Sid 168
2 Ray. 478
Skang. 716
Bur. Settlements 49

A widow by marriage gains a right of settlement in a parish with her husband; but acquires no settlement for her children. This rule, however, seems groundless when on English principles so far as it affects widows who, at the time of their marriage were able to support their children. For in this case the 2d husband is obliged to support them; & it would seem, that in such a case, they ought to acquire a settlement — Quere Does a ward gain a settlement by a residence with his guardian?

Bur. Settlements 567

If the father has no settlement & the mother has one of her own, her settlement shall be the settlement of her children Quere — Is not her settlement suspended during coverture? After coverture ceases the wife's settlement will revive to herself & children

Skang. 683. 5 Mo

The wife by marrying gains the settlement of her husband, if he has any; but if he has none, tho she gains no new settlement, she does not lose the old one. Qr. C. the mother's settlement is that of her bastard.

Of Master & Servant

The different kinds of servants are — 1 — Slaves — 2 Apprentices — 3 — Menial Servants — 4 Day Labourers — — Agents, Factors &c. Note. Perhaps it might be made a question whether Day Labourers are comprehended in our laws as servants. Mr Prices opinion is that they are so far servants, as to render their masters liable for their torts. Id quere de hoc.

Id. 218

Slaves in Con., if such beings can legally exist in this State, differ from other servants only in the duration of their services. It has been doubted whether slavery has ever in this state duly authorized by law. If slavery has been established by ~~by~~ law in C, it must have been so established either by stat or legal decisions; for by common law it clearly is not warranted.

1 Of a sanction by Statute. There is no stat in this state expressly warranting slavery. But two stats relating very directly to this subject. – one obliging masters to maintain their slaves — the other emancipating at the age of 25 years all slaves that should be born after the year D 1784. These have been thought to give an implied sanction to slavery. There is another stat making all born after 1777, free at the age of 21 –

Stat. B. L. 62

3. Massachusetts, When the contrary law supporting slavery on the same in Connecticut it has been decided by their Sup. Court that slavery is no part of their laws.

— 2 — Of judicial Decisions. The majority of the judges of the Sup. Court in Connecticut have, in several instances, expressed their opinions to be that slavery has been legally established in this State. But there has been no adjudication directly on this point.

Higgenson argued that an African may be condemned to slavery for his crimes

Master & Servant

It has been holden by our S. Court that the presumption is in favour of the liberty of a white man, against that of a black man. It has been decided, that a master cannot maintain trover to recover his slave; tho he may sell him, or he may be taken in execution. The Court held, that to recover a slave from a third person, the action must be the same as to recover an apprentice. And, indeed, they appear to have considered slaves as entitled to the same rights as other men, except they are bound to a perpetual service. Quere. If a master has recovered a stranger for retaining his slave, & the Deft continues to retain him, can the master bring a 2 action.

Our S. Court have considered the sale of a slave as in the nature of an assignment of an apprentice by the custom of London. They seem to have gone on the ground, that slavery, so far as it relates to the master right to the perpetual service of the Negro, is legalized

The Court has also said, that a Negro in slavery may recover property & sue for it by his ~~property~~ prochein ami. Upon that principle it would seem that a slave in C. might maintain an action agst his master. Indeed a Negro has once sued his master for selling him to a distant master & thus separating him from his family; and tho' there was no decision, the Court privately advised his master to repurchase him & he did so.

6 Mod. 182
2 Ray. 1107
Salk. 65. C. Lit. 172
2 Mod. 15 Wms. 39
Cro. Car 179. 545
Co. gan. 497
6 Doug. 518

Apprentices must be bound by deed. This probably depends on com. law, as there is no stat which makes writing in this case necessary. Any other servant may be bound by parol agreement. Mil. wants, except apprentices & slaves, are entitled to wages.

By a stat of Eliz. minors are impowered to bind themselves apprentices. But as the minors privilege of avoiding his contracts is not by this stat. expressly taken away, the Cts have decided that contracts thus made are voidable, & of course, that the infants are not liable on the contracts or covenants. In this respect however, the minor is, in all other respects

Master & Servant

upon the same footing with all other servants; & the master has all the rights common to masters, except that he cannot hold the minor to his contracts. At no stat, like that of Eliz. exists in this state, minors cannot bind themselves by indenture. Quere. Can a Guardian in Chancery bind his ward out an apprentice according to custom. He can, which would probably be considered as law.

Stat of C

The Master cannot, by com law assign over his apprentice to another, because a fiduciary, personal trust is reposed in the master by the parent, & personal trusts are not transferable. The Executor not being liable to perform the personal trusts reposed in the testator, is, of course not bound to perform a personal trust reposed in a departing an apprentice; vice versa.

Vide

Whether an executor of a master is bound to furnish diet, clothing &c. for the apprentice according to the masters covenants has been a question; & the decisions on this point have been contradictory.

1 Lev. 177
Hang. 1267
Id. 216

But as clothes &c are in this case, permitted, in consideration of service performed by the apprentice, the executor having no right to service, ought not on principle to be liable. But if a premium is given with the apprentice the executor ought to provide for him after the master's death, or return a proportional part of the premium

Co. Lit. 117
Vid.
2 Ld 66
2 Hang. 1267
2 Hay 683

~~All that~~ Which an apprentice gains belongs absolutely to the master. And if an apprentice run away & earns money, this money & any goods purchased with it, belong to the master, & may be recovered in an action of indebitatus assumpsit or any other action which is proper out of the hands of any person who claim them.

Master & Servant

The earnings of a hired servant while in actual service belong absolutely to the master. But if a hired servant runs away & earns money in the service of another person the master has no claim to the money thus earned, tho' he may have an action against the servant for breach of contract.

Esp. 56

If a servant of any kind is enticed away from his master's service, the person enticing him is liable to an action on the case

Co. Lit. 42

Menial servants may be hired by parol; & if no specific time is mentioned in the contract, the hiring is by the Eng law construed to be for a year. But in Com. there is no such rule or practice.

A promise made to a servant transacting his master's business, or to any other acting in the capacity of a servant is considered, in law as made to the master. & an action may be brought on the promise in the master's name.

If a servant has been beaten, robbed &c of his master's money or other property, an action lies for the master or servant if he brings his action first; but a recovery by one is a bar to a recovery by the other. The reasons assigned for permitting the servant to maintain an action, in this case, are that he is liable over to the master & that there is frequently necessity of a more speedy prosecution than can be instituted by the master. So far as these reasons extend they appear satisfactory.

Bac. Ab 563 Both the adjudications have frequently been broader than the principle. If a servant by command of his master do an unlawful act both are liable.

Money gained from the servant by an illegal contract, may be recovered back by the master. But if the servant squander away or foolishly expend the money of his master it cannot be recovered back —

Master & Servant

1 Roy. 120
Lith. 58. 190
1 Vent. 295
2 Salk. 441
2 Roy. 758
3 Bac. Ab. 562

If a servant in performance of his master's business, commit a wrong the master is liable in damages. But if the servant, when he commits the tort is not then employed in his master's business, he & not the master is liable.

If the tort be by mere negligence, & the servant in his master's business at the time of the negligence happening the master is liable; if the tort is wilfull the servant himself is liable.

3 Skin. 228

Formerly in Eng. if the Sheriff's Deputy committed a tort in the discharge of his office, the Sheriff was not liable; but now he is liable civiliter & not criminaliter

Dang 62

In some of these cases, however, is there any necessity of suing the master, if the servant is able to answer in damages? For he is always liable to the party injured in the first instance. This is true of wilfull torts & probably of those committed by negligence; but, query, if the torts are those, want of skill.

Masters liability on the Contracts of their Servants

Whenever the contract of the servant binds the master, it is considered as virtually the contract of the master himself. This is the ~~[illegible]~~ governing principle of the masters liability

2 Vent. 643
2 Ray. 294. 221
1 Show. 95

The liability of the Master cannot in this case be discharged by any private dissolution of the connection between himself & his ~~master~~ servant.

1 Mod. 323
2 Rol. 693
no. Eliz. 181
no. jam. 171

For the negligences, misfeasances frauds & torts of the servant committed when actually in his masters business the master is always liable, & sometimes the servant also, as will presently be explained.

It has been adjudged in Eng. that if a master sent his servant to a fair to sell horses, being unsound, but gives him no directions to sell them to any particular person as A. or B. the master is not liable. These adjudications are not grounded on principle.

1 Rol. 95
Popl. 143

150

Masters liability on servants account

Cro. Car. 469
2 Rol 693
Cro. Eliz. 181
3 Mod. 323
Ryth. 143

The case in Cro. James 469 M. Bacon concludes on not law, supposes the Master liable for his servants fraud in transacting his business, tho he were not privy to the fraud.

If a master allows his servant to trade for him & use his name, the master is liable for his contracts, because he has allowed him to make use of his name & given him credit with the public

Carthew 187
2 Ling. 646

Post-Masters have been adjudged not liable for the mistakes of their Deputies

Com. Dig. 100
Ling. 754
Vol 90 contra

In most of the foregoing cases the servant is liable as well as the master. The rule of determination appears to be this: When the fraud or injury committed by the servant in his master's business is direct & intentional the servant is always liable as well as the master: otherwise, if it should happen that the servant was a mere instrument & entirely ignorant of the fraud or injury. In cases of negligence by the servant, where the habitual or mere

cannot imply a contract, both master & servant are liable, as in the case of a cask of sack bidged by the servants negligence in driving a team. But where from the nature of the transaction a contract may be implied the Master is liable to the party injured: as if the apprentice in shewing a horse lame him.

1 Salk. 290.
7 Mod. 120
Salk. 440
Carth. 58
Wide

In the Eng. Courts it has been adjudged that an attorney is not liable for promoting fraud in favour of his client & against the opposite party in an action. This case is that of an Innkeeper's servant stealing a couple of sheets contrary to principle

1 Mod. 204

Vol. 95. 6

Coercion arising merely from reverence or from fear, not amounting to duress per minas will not justify the torts of servants, more than those of any other persons

Tho, in gen., the contract of the servant acting under the authority of the master is the master's contract, yet when the servant in transacting his master's business makes a contract expressly his own & engages for himself he is personally liable

Yelv. 157

Masters liability on servants account

A servant may also, in some instances, be liable on an implied contract, tho acting in the business of his master; as when he does not use his master's name.

When a servant willfully cheats another he was used to be liable in damages; & on the master's being sued for indemnification, he was held not liable.

Co Jam 671

A promise to a servant by a stranger his master business is, in contemplation of law, a promise to the master; & the master may sue upon it in his own name, if the contract can be identified so as to bar another action by the servant. A master has an action against the disobedience of his servant if it has been any damage to him; otherwise not.

When the master, being not in fault, is liable to the party injured, for the mistakes or faults of his servant, he has in many cases, a remedy against the servant. The rule of discrimination appears to be this: That as the servant impliedly promises faithfulness & diligence in his master's service, & in

Cowp. 341
1 T. Rep. 535
11 Mod. 109

transacting his master's business, he does any injury thereby, want of skill of these qualities, he is liable to the master therefor the want of skill he is not.

It is a gen. rule at com. law that, if property is voluntarily intrusted to one, & he makes way with it, animo furandi it is not theft, but merely a civil injury. The Stat 21 of Hen. 8th has made this a felony in servants, except apprentices and others under the age of 18. Whether this stat. is binding in Connect is doubtful, but it is in general supposed not to be.

Lev. Rep.
Sit. Pracc

Some, however, hold, that in case of Bailment, theft cannot be committed by the bailment wife. But if a person make use of imposition to get property into his hands & then carries it away animo furandi, he is guilty of theft; but, in case of a sale, the property is safe

Of the Correction of Servants

The law respecting the correcting of servants is in gen the same as that which relates to the correction of children. It is said that a master may not correct his servant; but by this is probably meant that he may not use dangerous weapons in correcting him in a dangerous manner. But if the master in giving reasonable correction, accidentally wound the servant it never happens the master would be liable in damages. The same law is said to apply to all servants in Eng. But in Connect. the rights of masters extend not to labourers, tho' it does to those who are apprentices, & perhaps to menial servants

Id 176. 2 Ld. 107
Vent 70
1 Blac. Com. 428 contra

The Master cannot delegate his rights of correction to another.

Strang. 953

A servant may justify an assault & battery in defence of his master; but whether the correctness of this rule is law is doubtful. It would seem on principle the rule might to be reversed. The authorities on this rule are contradictory. The master may have an action for wood against every one who has beaten his servant

1 Blac. Com. 429
Esp. 545
1 Vol. 546
Salk 407 & Ld. 118
10 Ld. 181. 9 Geo. 60
2 Vol. 568

Sd Roy 116
Salk 380
2 Lev. 63
2 Sid 66
1 Black. R. 429

The master may have an action on the case against any one who entices away his servant, or against the servant himself. & also agt any one who imployes him, knowing him to be a servant, or after information & demand by the master the imployer refuses to return him. And in the case of an apprentice the master is entitled to all the wages which the servant earns while with the stranger

vide

In Eng an apprentice gains a settlement by a residence of 40 day in the place where he served his apprenticeship, after his time is out with his master. Other servants gain a settlement by one years residence & service in a place

Mss. Stat on attend 1792

According to the wood of our stat, any person by living one year in a place without being warned out of town gains a settlement. But whether apprentices are comprehended in the stat has been a question, because they

cannot be warned to leave the Town in which their Master resides. This objection may also be urged against the wife, who cannot be warned to leave her husband; & get the same settlement by marriage, if the husband has any. According to our best adjudications an apprentice gains no settlement by residence.

Fol.

Of Executors & Administrators

Executors & Administrators are the representatives of the deceased for certain purposes.

A Devisee is a person entitled to real property by the testament or appointment of a deceased person. The Heir is a person whom the law hath appointed to inherit the property of the ancestor at his death.

A Legatee is a person entitled to personal property by the testament or appointment of the deceased person.

In Eng. the Exect. or Admr. has no power over the real property of the testate or intestate given them by their appointment; & over personal property their power is nearly that of trustees. An Exect. may however, like any other person, have by the express appointment

of the testator the disposal of real property; but Administrators as such never have. If the the lands be devised for the payment of debts, & the executor be not named to sell, cannot the Admnstr.?

Wh. 420

A Devisee takes the real property devised to him, by entering upon it immediately, without the intervention of Executors. A Legatee receives his legacy thro' the Executors

The personal property is by law charged with the debts of the Testator. The real property is charged with the debts recorded by specialty, only & those of record. This is the rule at com. law, but by stat. it is altered. Debts of record charge the real property of the Debtor from the first day of the term in which judgement was recorded, & the personal property from the date of the execution —

3 Bl. Com. 421

Creditors by specialty may, at their sole election, make their demand on the real or personal property of the Debtor. If they come upon the personal property and it is insufficient to discharge all the debts of the creditors, those by simple contract are, at law, liable to lose their debts; because in Eng. debts of a superior rank must be discharged before those of one inferior, even to the exclusion of the latter.

#vide 51

But in this case Chancery will relieve simple contract creditors & let them in upon the real estate so far as the specialty creditors have taken of the personal estate.

Bos. on M. 377
Salk. 53
Salk. 245. 246

This relief is afforded by ordering a sale of the real property in the hands of the heir & if the avails are insufficient to satisfy all the simple contract debts they are to be paid among the creditors. The rules of Chancery are adopted by our law.

3 P. Wm. 322
Bos. on M. 377 &c

6) Creditors in equal degree, he who first recovers judgement is entitled to full payment, even to the exclusion of the rest, according to the Eng. law

160 Ex.rs & Adm.rs — Order of Debts — how charged

In Eng. if the testator charges his debts on his real estate, the Exect cannot be sued, at law, to sell the land & make payment of the debts; but Chancery will order him to sell the property, & if he fails to obey, the Court will sell the property. If the Court itself make the sale, or the Executor under an order from the Court, the assets of the land are equitable assets, that is, to be averaged, if insufficient among the creditors. But if in this case the executors voluntarily sell the land, without the intervention of Chancery, the money arising from the sale is legal assets, that is, payable according to the rank & priority of the claims. Money raised by bequests is always equitable assets.

1 Atk. 420

In our law as in Chancery all debts are of equal rank —

If the Testator charges a debt upon the heir & the creditor comes upon the personal estate, the executor may come upon the heir for the amount of the debt. Our Law is the same.

By our law real as well as personal estate, is assets in the hands of the executor or administrator

In Eng. if a creditor by specialty sues the heir, the latter is not personally liable & therefore cannot be taken in execution. The creditors claim against the land only, which is not to be sold, but is to be appropriated to the creditors. This at com law is the only instance in which property is appropriated to the creditors. For this reason creditors often elect rather to come upon the personal estate than the real.

At com. law real estate is not liable for debts, even by specialty of alienee by the heir before the creditor prosecutes his claim. But now by stat. the heir, in case of such alienation is personally liable with his whole property.

Devisees are not at com law, postponed to creditors, but by stat of W. & M. they are.

Ex.r & Adm.r payment of Debts &c

In C. as in Eng. the real estate descends to the heir; & the personal estate goes to the executors & is to be applied to the payments of debts &c. If his personal estate is insufficient, it is the duty of the executor to represent such deficiency to the judge of Probate who will grant the executor an order to sell so much of the real estate as is necessary to discharge the debts &c. And if in this case the executor will not sell he is liable to answer the demand of creditors out of his own property. Before such sale is made the title of the land is in the heir, & any action for the prop. must be brought by him; but he must account with the executor for the damages recovered.

In C. no priority is allowed in the payment of debts, except those due to the government, the last sickness and the funeral charges of the deceased. If the whole estate is insufficient for the payment of the debts it is averaged among the creditors —

An Executor or Administrator can in C.
1 Ld 428 never plead ne ayant, but if sued for more than the average must show the doings of the Court of Probate - Quere. May he not plead ne ayant if formal charges take the whole estate?

#vide

Courts of Probate have power, even when the estate is insolvent, to make the widow some allowance out of the personal property of the deceased; such as apparel, household furniture &c.

The Executor cannot by payment of debts out of his own property acquire a title to land which he was impowered to sell for the payment of debts.

If in Eng. an executor is appointed, it has been a question, to whom the surplus of personal property, after the payment of debts & legacies, belongs.

Ex. & Adm. — residuary legatee

Formerly the executor himself was considered as residuary legatee. But now if any considerable legacy, not appropriated to any particular person, is left to the executor; or if there can be collected from the will any intention of the testator, that the executor should not take the residuum the Court of Chancery will order a distribution as in the case of an Administrator. Still however if no such intention can be inferred from the will, the Executor will be considered as residuary legatee.

Talb. cases 240 Dr. Par. ch. 179 3 P. Wm. 13

The Executor in Eng. has no wages for his trouble.

By the Comth in Q. executors have never been considered as residuary legatees; & as they are paid for their trouble it would seem that on principle they have no more right to claim the residuum than an administrator.

After payment of debts & legacies the executors & after payment of debts the administrators, are by the Eng. law bound to make a distribution of the personal property. The law in this State is the same.

The mode of distribution in Eng. is established by 22 & 23 of Car. II & in Connecticut there is a similar Stat.

See Stat.

As the Ecclesiastical Courts had the management of the estates of deceased persons, the rules of the civil law were adopted to determine who are the nearest akin, being pointed out in the Stat of distributions. The same mode of computation has been adopted in Connecticut. Distributary shares vest in the kindred of the intestate at his death; & are transmissible tho' the distributary dies before distribution. A distributary share will vest in an infant in ventre sa mere under the stat of distributions. And in Eng. no distri=

Ex^r & Adm^r — distribution.

= bution is made till one year shall have expired after the death of the intestate. Does the legal rule obtain in Connecticut.

2 P. Wm. 56
2 Ves. 213
Pec. Chancy 28
1 Ed. 286
Lowelys 71

The personal estate goes first to the next akin in the descending line & their legal representatives, that is the children & their issue ad infinitum. So long as any of the old stock remains in any of the lineal degree, the estate goes per stirpes in your representations: But after the old stock is extinct the distribution is per capita and not per stirpes. If there be no issue of the deceased, the estate goes to the next of kin in the ascending line & to their legal representatives. Of the persons related to the deceased in equal degree no preference is given one to another, except those in the descending line exclude ancestors & collaterals, whatever their degree of kindred may be

In the civil law, proximity in the common quantity of blood is regarded in calculating degrees of kindred

1 Vent 316. 329. The rule representations extends among collaterals no farther than to the children of brothers & sisters. Beyond this degree, kindred can claim in their own right only. If therefore, the brothers & sisters of the propositus are dead & part of their children also; those nephews & nieces, who survive shall take the whole estate to the exclusion of the grand nephews & nieces of the propositus, that is, to the exclusion of the grand children of the brothers & sisters of the ancestor.

1 Atk 458 A Stat. of James 2 ranks the mother with the brothers & sisters in the distribution of personal property, but here there is no such law. And even

Ex.r & Adm.r — Distribution

in Eng. this degradation of the mother takes place only when there are brothers & sisters or their children living.

In the distribution of personal property no distinction is made between the whole & the half blood, the civil law strictly regulates this distribution, not regarding the quantity but proximity of blood

1 Vesey 316. 323

If the father of the deceased is living the mother takes nothing, because whatever she might take would become immediately the husbands.

If after a divorce of the father & mother a divorce by Parliament for supervening causes, the condis, his father & mother being alive, it is doubted whether a no the mother would be entitled to any property. But as the father's right to her personal property has ceased it seems that on good principle the husband claim. If the divorce was a mensa et thoro the court, which her husband was living, claim nothing of the personal property of her children; because her husbands rights to her property of this ~~children~~ kind is not extinct; but after the ~~death~~ husbands death the mother has a claim. And in cases where the marriage was not ab initio void she is entitled to a share after the husbands death.

According to the Eng. laws & adjudications, the brother takes to the exclusion of grand parents. Query. Are these decisions reconcilable with the governing rules?

3. Atk. 762

Children in ventre sa mere are by the civil & com law considered for many purposes as being in esse — are capable of taking property according to the rules of descent & distribution. And in favorem of such an infant an injunction may be granted to stay waste

2 Atk. 115
2 Term 274

The distribution of real & personal property under the Statute of Connecticut.—

The real & personal property is distributed under this Stat in equal shares among the children of the intestate, after the widow's share is taken out. Representation extends in the descending line ad infinitum, provided any of the ad stock remains; & it is immaterial whether the ad stock be in the first collateral degree to the father, grand father or any more remote lineal ancestor of the person claiming per representations. If the intestate leaves no issue, the estate goes to his brothers or sisters or other relatives as follows —

Loveless 7 Ki

If real estate came to the intestate by descent, devise or deed of gift from his parent, ancestor or other relations, it will go to his brothers & sisters & their legal representatives, being of the blood

of the ancestor from whom the estate came. If no such are found the estate goes to the next akin to & of the blood of the ancestor from whom the estate was rec'd. The construction of this last cited clause of the stat has made much dispute; & no legal adjudication has as yet settle the dispute. The peculiar phrase "of the blood" was, linearly descended from; & it has been contended that this is the true meaning of that phrase in our stat. According to this construction the person claiming must have linearly descended from the ancestor from whom the estate came. And thus, if by the former clause we are to understand "next of kin to" to refer to the ancestor, instead of the intestate the qualification of the person claiming must be these two, viz., that he is next of kin to & linearly descended from the ancestor from whom the estate came.

In many modern laws writers, of the blood means no other than of kin or related by blood. In this sense Mr. Ruiz & others suppose the phrase ought to be understood in our Stat.

It is, indeed, acknowledged that the Stat as it now stands does not easily admit of this latter construction. For if "next of kin" & "of the blood both refer to the same person (as really appears to be the case according to the most obvious grammatical construction) the latter phrase is altogether superfluous, since it contains no idea not expressed in the former. Therefore, to make out the construction it is that they ought to be considered as referring to different persons; the former to the intestate, the latter to the ancestor, from whom the estate came — thus "the next akin to the intestate — "of the blood of" the ancestor from whom

and notwithstanding the objection to the construction, it is considered as sound, from the general tenor of the Stat. & from other considerations. The reasons in favour of Mr Rieves construction are the following.

1. The phrase "next of kin", when used by legal writers always refers to the propositus.

2. The next of kin are in their way Stat provided for after brothers & sisters. But in many instances, brothers & sisters cannot be next of kin to the ancestor or linearly descended from him. And, as brothers & sisters are allowed to take without being next of kin to, or linearly descended from the ancestor; it would seem that the two phrases "next of kin" & "of the blood" when used to designate other claimants ought, by the rules of analogy to bear Mr Rieves construction: that the former does not refer to the ancestor & that the latter means nothing more than "of kin" or related by blood. Indeed if the contrary construction were adopted & could be extended to the brothers & sisters, it would, in many instances deprive them of the very shares the Stat expressly allows them.

3. But if the brothers & sisters are lineally descended from the ancestor from whom the estate came, then in most instances, the preceding clause affecting brothers & sisters, makes exactly the same provision, as is made by this different clause, upon the clause upon the peculiar construction of the passage "of the blood" and, of course, in the cases the description of claimants, by words brothers & sisters is consumepary.

In a subsequent clause of the Stat., relating to personal property & such real as was acquired by purchase in its limited sense, it is enacted that if there are no brothers or sisters of the whole blood, nor parents, the estate shall go to brothers & sisters of the half blood. But parents take before brothers & sisters of the half blood. But, as the Statute stands, altho after no parents & no brothers & sisters of the whole blood, the brothers & sisters of the half blood take, yet it does not go to their legal representatives. This is not conformable to the general rule; for in all other instances, representation extends to the children of brothers &

sisters. But by this Stat. the children of brothers & sisters of the half blood are totally excluded. This it seems was not the intention of the Legislature; for in the original draught of this Stat. by Judge Sherman the words "their legal representatives" were placed as referring to brothers & sisters of the half blood, not to the words "next of kind" as at present.

When estates are acquired by purchase in the limited sense of the word the order of distribution, on failure of issue, is, first to brothers & sisters of the whole blood & their legal representatives; then to parents; then to brothers & sisters of the half blood (and their legal representatives); & then the next akin: those of the whole blood in each degree being preferred to those of the half blood. Representation extends no further than the children of the brother & sister in Eng. This last rule applies to every kind of property personal or real acquired by purchase or descent.

Executors are by our Stat. obliged to give bonds & make distribution in the same manner as Administrators

By a Stat. of Charles 2d every child, except the heir at law, if he has received an advancement from the father during his life, before he shall be allowed to come in for a share under the Stat. of distributions, shall bring in what he has received & shall it into hotch pot. This rule operates in those cases only, in which the father dies intestate as to the whole of his property.

By the law of C. a child who has received any thing, by way of advancement from the intestate, during his life, or a legacy at his death is not required to bring it into hotch pot to be entitled to a distribution of his share; but such advancement or legacy is counted to the child for a part or the whole of his share.

At the death of the testator the inchoate right of the legatee commences, tho the legal property of the legacy still exists in the executor, he may dispose of even a specific legacy for the payments of debts. The assent of the executor vests the property in the legatee; & any slight matter amounts to an assent.

1 Ld. 137.
1 35, 6.

Donatio causa mortis is a specific gift made in contemplation of death. The gift is always conditional; for if the donor recovers, the donee is not entitled to the property. If the donor dies the property vests immediately in the donee, without the intervention of the Executor or any other person. To give effect to a donatio causa mortis there must be a manual delivery of the thing given or some act by the donor done amounting to it.

A Gift of this kind is not good against creditors; but no action lies in this case against the ~~executor~~ donator, he not being intrusted with the gift. Mr. Ouvers mispropos

that the creditor, who claims against the donee must bring his action as right on behalf in their own wrong.

vide

It seems that a chose in action of a negotiable nature may pass as a donatio causa mortis; but if it is not negotiable the better opinion is that it will not pass. Why may it not? For Chancery may perfect the assignment in other cases

30 Wm. 357
242
10 Wm. 441
3 Atk. 214
2 Ves. 431

In all descriptions of persons who claim to be legatees, the intention of the testator must be weighed

2 Ves. 206

It has been adjudged that grand children may take under the description of children if the testator has no children. Property given to be equally distributed among the testators relations: or his poor relations, or his relations of good moral character is to be divided according to the stat of distribution — the description being too general to have any effect. This is now settled law.

By a gift in a will of all the testators property, all that he had at the time

Salk. 237 of his death will pass. The rule respecting real property is directly the reverse; for such a part of real estate only will pass as belongs to the testator at the time of making the devise.

2 Ves. 688 A bequest of all or more specific property in a particular place, extends to all which he may afterwards acquire in that place.

2 C. Wm. 616
1 Ves. 521
2 Ves. Jun. 636
Rec. in C. 236
3 P. Wm. 227
2 Atk. 300
9 Atk. 96. 196
10 P. Wm. 460
Rec. Chan. 240
1 Br. C. C. 425
389. 129
295.
2 P. Wm. 555
Lord. 155

So a bequest of a particular thing at a certain place, the thing passes as specified whether in that place or not, at the time of the testator's death. It was formerly a rule, that if a money legacy to a creditor, it should be considered in satisfaction of the debt, if it was equal or superior in value to the debt, but not otherwise. But now by repeated adjudications the rule is virtually abolished. As - 1. That the legacy, in order to operate as an extinguishment of the debt, ejusdem generis with the debt - 2 - It must be payable at the same time or at least as soon - 3 - That there be no clause directing a previous payment of just debts - 4 - That the rule does not apply against an illegitimate child - 5 That the intention of the testator to extinguish the debt be apparent; that it be expressly given in payment of the debt

Distribution under Stat. of Con.

4 P. Wm. 123. 4 25

If several legacies, given to one person, are exactly the same in quality & quantity, in the same instrument, they are not to be taken in the aggregate, but single; otherwise ~~not~~ they are

Per Chancery 263. 188 2 Vern. 555 115. 556 1 Vern 95 1 P. Wm. 324, 5

A legacy to the wife, or other person entitled to money from the testator, by articles of marriage settlement is generally considered as intended to be a satisfaction in part or whole of what is due; & tho the legatee may have her election which she will have she cannot have both

Per Chancery 263. 1 Vern. 95 2 Vern. 115

A gift to a legatee, by a testator during his life, is considered as a part of the legacy bequeathed by the will made previous to such gift

Legacies may divided into Vested & Lapsed.

Lovelapp 205

The residuary legatee, if there is one, is entitled to lapsed legacies; but if there is none the lapsed legacy will go according to the Stat. of distributions. To this rule there is one or two exceptions. Charging will compel the heir to pay a legacy charged on his land: But if the legacy is lapsed or if it be vested, & the legatee dies before the day of payment, the heir will take it, to the exclusion of the residuary legatee & of those who claim under the Stat. of Distributions. No ~~same~~ same favour is shown to Devises on which legacies are charged. It has been decided both in Eng. & C. that, if a legacy lapses by the death of the legatee, living the life of the testator, such legacy goes to the next of kin. But if it lapses by failure of a condition, upon which it was given, it goes to the residuary legatee.

1 Atk 552

2 Ch. Ca. 276

2 Ven. 39-115.

Cro. Chancery 570 — A Legacy may be made with proviso, that if the legatee die before the testator, or before the legatee arrives to a certain age, it shall go to another: And such a limitation is good.

2 Vern. 207
Ch. 521

1 Vent. 342. Salk. 415 — A legacy given to A. & payable at a future day is a vested legacy; but if
Cutth. 62. 2 Vern. 462
Prec. in Chan. 21 — given to a person, when he arrives at a certain
2 Vern 673 — age, it does not vest till he arrives at that
Strang. 820. 966 — age; & if he dies before the time specified,
1 Ves. 512 — it becomes lapsed. But, if on a legacy made in this latter manner, interest be payable,
2 Vern. 673 — it is a vested legacy

If a legatee dies before his testator the legacy is lapsed.

Legacies to which general conditions are annexed in restraint of marriage are vested absolutely; & the conditions
1 Mod. 86 — are void. Restrictions as to any class
1 Vern 20 — or description of persons are void. But a legacy, left by a husband, leaving a family of children, to his wife, on condition not to marry is a good condition & stands as an exception to this general rule. For the husband is supposed to have in view the education of his children.

1 P. Wm. 285

to restrictive conditions of marrying before a reasonable age, or not to marry at a particular place, have been adjudged good: as also not to marry a papist.

1 Vent 199
1 Atk 502
Pur. m. Chan 565

Legacies given on condition of being forfeited, if the legatee marries without the consent of a particular person, are not subject to forfeiture, unless limited to arise on the breach of the condition. A legacy given to vest with opportunity to the survivor, if either of them dies before marriage & before the age of 21, but not otherwise.

1 P. Wm. 285
5 Rep. 89
4 Rep. 18.

If a legacy is paid by the Executor to the father of a legatee it is at the risque of the Executor; but not, if paid to any other guardian: In every other guardian given security for the faithful discharge of their trust.

If no time is appointed by the testator for the payment of the legacy, it is payable at the expiration of one year after the death of the testator. A Legacy is payable to the representatives of the deceased legatee, at the time originally fixed for the payment

2 Vern. 31. 283

The person entitled to a lapsed legacy is may demand payment of it immediately upon the death of the first legatee; provided, as is supposed, such legatee was at the time of his death entitled to immediate payment

If a legacy is demanded at the expiration of a year, it bears interest from that time; & in case of a minor if no demand is made it bears interest after the year. The law is the same as respects interest in the same in Carr in Eq.

If a legacy is appointed by the testator to be paid at a certain time, it is not fully settled whether it shall bear interest from the time set by the testator or from the time of a demand of payment; but modern authorities are in favour of the opinion that it will bear interest from the time of a demand of payment & not before.

Talk. 515

Cas. Ch. 11. 161

If a legacy is made payable to a child of the testator, even at a time certain in future, & no other provision is made for his maintenance, it will bear interest from a year immediately after the testators death.

Legacies vested & lapsed

By the com. law money made payable at a certain day, bears interest from that day

If a testator charges his debts upon his lands, yet personal funds are to be first exhausted, even to the exclusion of legatees; but legatees are in return let in upon the lands. This rule it is presumed would not be adopted here, as it clearly tends to defeat the testators intentions.

When the personal funds are exhausted by specialty creditors, equity will let in creditors & legatees, against the lands charged with the debts if any; & also against the heir, but not against the devisee.

Talk 416
3. P. Wm. 322

Of Specific & Pecuniary Legacies.

Specific Legacies are bequests of things specified. Pecuniary Legacies are bequests of sums of money made in general terms, which do not identify any particular fund.

Pecuniary legacies are liable
C. Eq. 467 to creditors before specific.

Specific legacies are liable to creditors if other assets fail. But if a part only of the specific legacy is taken for the payment of debts; the legatees of such parts are not taken incompetable in chancery to make a reasonable abatement to those of such legacies have been taken. This is made obtains, however, only when it is necessary to take a part of the specific legacies. For if the Executor takes any legacy of this kind when he has a sufficiency of other assets, he is liable for the amount of the legacy taken

Legacies - specific - pecuniary

If a specific legacy is lost or destroyed by any unavoidable accident, the legatee to whom it was given must alone bear the loss.

Per Thurm. 392

If the whole of the personal estate of a particular person, or place is bequeathed in specific legacies; & afterwards a pecuniary legacy is given to be paid out of the personal estate already disposed of; the specifics are all charged with the payment of the pecuniary legacy; there being no other personal property from which it can be discharged.

2 Vern. 358
2 Burr. 205

The Exr is not obliged to pay a legacy to any legatee without he gives a security to refund, if need debts appear.

No time is limited by the civil law for the exhibition of claims against the estate of a deceased. Jos. C. Litt. otherwise

1 Vern. Ch. 480

If a legatee, on receiving his legacy has not given bond to refund in favour of debts afterwards appearing; he is not compellable to do it.

2 Vent. 360 The rule last mentioned does not extend, if the exect, when he paid the legacies, was ignorant of the existence of those debts afterwards appearing; or if he is compelled in Chancery to pay them.

2 Ves. 193 Lovel. 210

2 Ves. 193 A creditor may come upon the goods of his debtor in the hands of a legatee, by a bill in Chancery, if the Exect is insolvent - not otherwise.

It is the duty of the Exect to retain assets for the payment of debts debita in præsenti, solvenda in futuro. If the Exect having these retained assets, become a bankrupt, it is doubtful whether the creditor can proceed against the assets in the hands of a legatee, or devisee. It seems as reasonable, on principle, that the creditor should proceed in this as in common cases. In C. it has been thought, that a creditor might, in these cases, by bill in Chancery to collect all the legatees & devisees that his demands may be charged upon them all in proportion to their shares.

Legacies - specific - pecuniary

Hob. 265
6 Mod. 26. 274
2 Ray. 957

In Eng. the mode of recovering legacies is by suit in the ecclesiastical courts or in Chancery. If the legacy is a charge on land, the latter method only is ob-served. In C. a suit for this purpose is brought in the com. law Courts. But neither in Eng. nor C. can the legatee re-cover his bequest till after a year & a day

Of Ademption of Legacies.

1 Ray. 333
2 Vern. 631
Lovel. 205
2 Blac. Co. 108

The accidental destruction of a legacy by the testator, may be an ademption or may not, according to the circumstances of the case. To determine the intention of the testator must be sought. If the alienation cannot be accounted for, but on the supposition that the testator intended an ademption, it is an ademption. But if the legacy is so lost or disposed of, that any other intention of the testator can be inferred, it is no ademption. If the thing bequeathed, is pledged or sold from necessity, this is no ademption. If a debt is bequeathed, & the testator calls in the debt for another purpose but to take it away from the legatee, it is an ademption. But if the

2 Vern 631

payment is unsolicited by the testator, or if the debtor is in failing circumstances,

1 Ray. 35

or if the testator is in want of money, the reception of the debt is no ademption, but the executor is answerable for the value of it: so in case where the legacy is destroyed.

Legacies—ademption of

If a life estate is created in personal property with a remainder over, the legatee for life is compellable to make an inventory of the property & to lodge it in Chancery. He is also compellable to give bond for the safe keeping of the property.

8. Ves. 334

If the personal fund amount than sufficient to pay simple contract debts, the heir may take the surplus, may take the surplus to pay debts by specialty, in preference to those who claim under the Act of Distributions. Qui. Q. Who call the property of the testator "intestate" is ultimately liable to creditors personal property is first liable.

2. Atk. 82

S. v. 5

Of persons entitled to Administration.

By Stat 29th of Car. II the husband is entitled to administration
2 Bac. Ab. 613 the wifes estate in preference to all others. But as there is no such Stat in Ten. & as that of Car. 2 is opposed to the spirit of the com law, Mr Reeves supposes that no such preference is here given the husband.

In C. if a married man dies, administration goes to the widow or next of kin the disjunctive or leaving it to either, according to the discretion of the C. of Probate. If a person unmarried dies, administration probably belongs, in the first place
1 Vang. 552 to the next of kin.

Two or more Administrators
1 Ad ~~[illegible]~~ 908 may be appointed, if the Court think it expedient; or administration of different parts of the estate of the intestate may be granted to different persons. But this can be done with propriety only in cases where the estate is
1 Salk. 36. divided, or that one cannot with convenience administer on the whole.

If there are several who are next of kin to the intestate, the Ct of Probate may, at discretion, prefer one or appoint several. With regard to kindred claiming administration no preference is given of the whole over the half blood.

Among kindred a female married, is commonly preferred to others of the same degree.

Note. If the administr. belongs to an infant, the Court must appoint an admintr. durante minoritate of the infant; & in making such appointment degrees of kindred are not regarded.

If the widow & next of kin refuse to accept of administration, creditors are entitled to it in preference to others. But if the creditors refuse, or if there is among them no proper person for the office, the Court may grant administration to any other person, at its discretion.

If the administrator dies before the estate is settled, administration de bonis non must be granted, & in this appointment no regard is had to the degree of kindred.

Jacob. Rep. 127 If of two or more executors or administrators one dies, the authority which originally vested in all, rests in the survivor. This rule is contrary to that which obtains in most similar cases. For in general of an authority is delegated to two or more jointly, it ceases at the death of any one of them.

Admrs must give bond for the faithful discharge of their trusts both in Eng. & C. And in C. an Exr is now, tho formerly ~~was~~ was not, obliged to do the same.

No person can be administrator before he is 21 years of age; & the person assigned in that behalf before that age he cannot give bonds. Yet in C. one may be Exr at according to the Act of 1785.

Ex.rs & Adm.rs — letters may be revoked by another State this required that every Executr give bond. A question, therefore has arisen whether the bond of an infant Executr is binding in contradiction to the principles of the com. law. As the law allows an infant to be Executr & requires that every Executr give bond, it would seem that, in this particular case the infant's bond would be good.

The Court of Probate cannot without good reason revoke an administration once granted: and if, on appeal to the Sup.r Court, the reasons assigned by the Judge of Probate are judged insufficient, such revocation will be set aside.

The powers and duty of an Executr & administrator are very nearly the same; & the authority of the former as well as the latter may be revoked. There are however, some points in which they differ.

If there are two or more admrs, receipts discharges &c must be executed by both or either as the case may be. But whatever may be the number of exors, receipts discharges &c may be executed by one alone.

Ath - 160

Exors & Admrs are bound for the testator or intestate to the extent of their assets only

In C. an exor or an admr^r can never plead plene administravit against a creditor, except in the case where the assets are merely sufficient to pay the funeral charges &c. In case of insolvency, where the estate is insufficient to pay a part of the debts besides funeral charges &c if a creditor sue for more than his average part, the exor or admr^r must produce in his defence the proceedings of the Court of Probate

vide

But if the debt be exhausted by creditors, plene administravit may be plead by a legatee.

Ex.r & Adm.r — when can be sued

In some cases the testator or intestate might sue when the execr. or admr. cannot; there are also cases in which the testator or intestate might be sued, but in which the execr. or admr. cannot.

The rule of discrimination in those cases in which the execr. or admr. may or may not sue & be sued, on account of the testator or intestate has been laid down thus; that the execr. or admr. is liable for the contracts, but not for the torts of the testator or intestate. But neither branch of this rule is strictly true. For there are cases in which the execr. or admr. is not liable for the contracts of the testator or intestate, & cases in which he is liable for the torts of the testator or intestate. The rule as to torts now established appears to be this. If the tort committed by the testator or intestate has benefited the estate of either of them, the execr. or admr. is liable. Otherwise not; even tho the tort committed by the testator or intestate, may have been an essential injury to the person on whom it was committed.

At com law exect or admr were not liable for any torts committed by the testator or intestate: And their present liability is derived from the equity of a Stat of Edward 1st 13th de offentatis acbonibus

But when a right of recovery for the torts of the testator or intestate survives to the exect or admr the action brought agst the latter must not sound in tort, but in contract. And the usual mode of recovery is by assumpsit which cannot be brought.

Cowp. 372

If an action which would survive agst the exect is brought against the testator, & the latter dies pending the suit, the action does not abate. If, in this case, the action is such as would not survive to the exect, it must abate. If therefore an action is brought agst the testator on a right of recovery which would survive agst the exect, & the action sound in tort the suit must according that principle abate, & the Plaff must resort to an action sound in contract agst the Exect. And when the action & the right of recovery will sur-

Cowp 372

Co. Eliz. 377
Salk. 168
Yelv. 87

-vice agt the exect, a fieri facias may be issued to summon the exect to answer to the suit.

It has been observed, that there are co contracts of the testator which will not survive agt the exect. The rule of discrimination in this case is; That where, as is usually the case, the contract is such, that the testator has received, or is to receive any consideration from the other party; on performance of the contract the exect is liable. But when according to the contract the testator was not to receive any consideration from the other party, but a compensation arising solely from the performance of the contract & in which the other party was not interested, if he fails of performance through mere negligence the exect is not liable. As if an officer who is to receive fees from the execution of a process fails thro. negligence to execute it. &c. Quere. Is not this a rule — That when the testator after have in contemplation of law been benefited the exect is liable.

1 Ld. 129

In Eng. no action survived against the exctr in those cases in which the testator might have waged his law.

C. Eliz. 600

In some instances also the exctr cannot maintain an action which the testator could. The rule is — That, if the tort committed has injured the property of the testator, the exr may maintain an action for the recovery of damages; otherwise he cannot.

When a suit is commenced by the testator, & is of such a nature as that it will survive to ~~the testator~~ the executor; & the testator dies before judgement, the exr may make himself a party to the action, by suggesting to the Court the death of the Deft & entering his own name on the record, instead of the testators.

In S. Ca no provision is made for the disposal of the residue of an estate, per contra vice where the tenant dies during ~~the~~ its continuance of. In Eng. it goes to the Exr.

Emblements are considered sometimes as real & sometimes as personal property. They passed of course by deed of land; & if an injury is done them, trespass lies. But as between the heir & exr. emblements are always considered as personal property; & also as between the lord & tenant where the estate is determined at an uncertain time. Query as to roots, the digging of which is injurious to the freehold

By the old law any thing fixed to the freehold, however slightly, was considered as a part of the realty. But this rule is now nearly reversed. For whatever is merely affixed to the freehold, is regarded as personal property; unless its separation would essentially injure that to which it is affixed. This rule, as now established, holds equally between heir & exr. & landlord & tenant.

3 Atk. B.

Certain Chattels are, by the custom of Eng. transmitted, like real property, by descent & are called heir looms. This kind of property is known to the laws of C.

It has not settled in C. whether, if an exr voluntarily pay a legacy & debts afterwards appear, he shall be permitted to pursue the assets in the hands of the legatee. It appears reasonable that the exr should have this privilege, tho in Eng he has not – Yet Mr. Reeves supposes that even in Eng. an action of assumpsit for goods had and received might lie; since the money in this case was paid by mistake, and of course the consideration fails.

*vide

Duty of Exrs & Admrs

The first business of an Exr is to make an inventory of all the estate of the testator which can be assets in his hands; & to procure an appraisement of it by judicious men under oath. After this, the Exr or Admr must account with the Ct of Probate for the property inventoried; but is not at all events liable for the loss unless it was occasioned by his own fraud or negligence. But if the loss happen by his fault, he is liable to an action on his bond by his creditors. But if creditors sue for their debts in common form, they must grounds their action merely on their inventory. If the estate should be sold for more than the appraised value, the Exr gains nothing, but must account with the Ct of Probate for the avails of the estate. The Exr is not liable on execution till assets are recd by him; unless he has made unreasonable delay. His liability is always according to the assets in his hands.

If the testator or intestate dies possessed of a term for years it belongs to the Exr or Adm.

Co Eliz. 712

If a lease for years comes to the hands of Exrs. or Admrs, they must annually add to the inventory the surplus of profits, if any, after the payment of rents — and the rule is the same with respect to all accruing profits. If a testator, seized in fee, makes a lease the rents, on his death goes to his heir.

Bac. Ab. 419

All reversions, however distant in point of time are real assets in the hands of the heir; and execution may go immediately against him, to be levied, quando acciderint.

Equities of redemption mortgages of testators are real assets in the hands of the heir; but not at law. If the testator grants an estate in esse vadio, the future estate of the heir is assets ~~at~~ real quando acciderint.

Duty of Exr. & Admr. - invoice - Commissioners -

Nam. 1.2

If the testator is mortgagee, or receives an estate in vadio, the effect is, on the testators death, a debt in the hands of Exr. & he may compel a foreclosure, if he will not pay the money for which the land is pledged; but not otherwise.

In O. on the death of the testator, & after inventory made, the real as well as personal property is appraised. The Ct of Probate then limit a time beyond which the exhibition of claims against the estate shall not be allowed. The personal property is first sold by order from Probate, & afterwards the real estate, if necessary under a power from Probate. After such sale or sales the debts are paid.

The Exr. may always represent the estate as insolvent if he chooses.

When the amount of debts compared with the value of the estate, is uncertain, the Exr may procure from the Ct of Probate, the appointment of commissioners, to examine claims exhibited agst the estate & to accept or reject them.

This rule is now altered # vide

The decisions of the ff of the ff commissioners are absolutely binding on the creditors; but not agst the executor. If they reject a claim the claimant has no other remedy; but to pray the Ct of Probate to appoint other commissioners to review the doings of the former. If the Ct indulge the claimant in this request his case is returned and finally determined. But if the Ct refuse to appoint new commissioners, the decision of the first is final. While this business is pending in Probate, all the suits agst the Exr are suspended.

In C. the Exr or Adm^r represents the deceased, both as to real & personal property. If the heir is ever liable, it must be upon the equitable principle, that the creditor may pursue assets wherever he can find them, in case there is no remedy agst the Exr or Adm^r

An Exr in his own wrong is one who without property authority, intermeddles with the property of the deceased. He is liable to creditors not as legal representatives ~~representatives~~ of the deceased but on the ground of having conducted in such a manner as to give creditors just ground to think, he is the legal representative.

The rule for determining what acts constitute an Exr de son tort is this: If the intermedling is such, as fairly allows the inference that he claims the management of the estate, & assumes upon himself the executorship, he is an Exr in his own wrong; but not otherwise. For it is never to be presumed, that he has assumed the executorship, if his conduct can be accounted for in any other way

5 Rep. 88
Carth. 414
10 ⅛

Claiming property as ones own will not make a person an Exr de son tort; unless the claim is merely colourable. If a rightful Exr has proved the will, or if a rightful Admr has accepted his appointment, & begun to act as Admr; no person can become Exr, de son tort; unless he intermeddles & also expressly claims the office of Exr or Admr.

A voluntary gift whether made to defraud creditors or not shall be good agst the donor his heirs, Exrs. & Admrs; but not agst creditors if there is not other property sufficient to discharge all the debts. In this case the Donee may, from the necessity of the case be used as an Ex. de son tort.

*vide

If an Ex. or Admr. before payment of debts & legacies, make distribution of the estate subject to debts & legacies, & becomes insolvent; the assets may be pursued by the creditors & legatees into the hands of the person to whom distribution had been made; such persons in either case being considered as Ex. de son tort. The former rule holds good in favour of creditors agst legatees.

An Ex. de son tort is not liable any further, than to the amount of the assets which he has taken; unless he plead ne unques Ex.; for if he make this plea, & the issue is found agst him, he shall be liable for the whole amount of the claim, whether he has assets or not.

Duty of Exr & Admr — Exr de son tort —

The rightful Exr or Admr may sue an Exr de son tort for the purpose in intermeddling; & payments of the debts pleaded by the latter will go only in mitigation of damages

A Exr de son tort has none of the privileges of a rightful Exr or Admr. He cannot retain assets for his own claims against creditors even of an inferior degree; nor can he maintain any action as Exr.

3 Rep. 30

Mr Preston supposes that according to the spirit of our Stat. there cannot be an Exr de son tort in C. No provision being made for an average distribution by such a character, & nothing mentioned concerning him. If such an Exr can exist in C. it must be on com law principles; & then in case of insolvency, the provision of the Stat as to average payments would be entirely defeated: the com law not recognizing any doctrine similar to our average law. The Cts, however have admitted such a character to have existence, tho the question has never been expressly made & adjudged.

Order of Debts

In Eng. the order of debts is as follows:

3 P. Wm. 402 — 1 - Funeral charges, expenses of proving the
Pitt. cases 217 will &c. — 2 Debts due to the King by record or
by specialty — 3 Debts by particular Statute,
as forfeitures &c. — 4 - Debts of record -
2 Vern. 524 — 5 — Debts by specialty — 6 Debts on
simple contract — If debts in equal degree
the Ex. may pay which he pleases first;
but he cannot prefer a debtium in presenti
solvendum in futuro, to those which are
already payable. A voluntary bond is pref=
1 Atk. 292 Lowd. 56 ferred to all debts; but is preferred to legacies.

If a Creditor objects to the payment
of a bond given by the deceased on the ground
that it is voluntary; the Ex. may by
bill bring the parties into Chancery at
their expence to litigate their claims &
then make payment according to the decision
of the Court.

An enquiry may always be made into the consideration of a bond, when third persons are interested.

Commissioners on the estate of a deceased person in C. appear to be incapable to enquire into the consideration of a bond, when such enquiry is necessary. But tho, if voluntary, it ought not to be included in the average in case of insolvency, neither ought it to be wholly rejected — for such a objection would serve but the obligee from making any claim; whereas in many cases, he may, by circumstances ex post facto become entitled to payment.

Void

In C. funeral expenses, those of last sickness, debts due to the public and expenses of Administration must be first paid. But with regard to other debts there is no distinction.

By our laws no person having neglected to exhibit his claims within the time limited by the Ct of Probat for that purpose can recover unless he discover concealed property of the deceased not entered in the inventory. In most cases the Ct have given judgement according to the average paid to their other creditors. But this judgement was reversed in the Ch.cery.

It indeed, seems that the J. Ct have no authority to give judgment in an average sense in these cases but that it belongs to the Ct of Probate. Mr Reeves supposes that the Stat. does not contemplate any merit in the person making the discovery of new property; but that, when new estate is discovered by any means the Ex. is obliged to inventory it; a new average may be made, & the new creditor, if his claim is allowed by commissioners appointed for that purpose, is, after receiving the average before paid to creditors, to take an average share of the remainder.

If the Ex. refuses to inventory newly discovered property, knowing it to belong to the intestate, he is liable on his bond. He is liable on his bond. But if the Ex. has doubts with regard to the ownership of the property it would seem reasonable, that the creditor claiming should indemnify him in making the inventory. Quer. Might not the creditor, in this case, on the refusal of the Ex. to inventory, (he having settled the whole estate before the discovery) take out adm. administration de bonis non

Of Wills

Lovelass. 2 — To every will in Eng there must be an Executor. A testamentary instrument not appointing an Ex is called a testament

Lovelass 160. 1 — Generally, every person not labouring under any disability has a right to dispose of the whole of his personal property by will. But a husband cannot by will dispose of his wife's Stifer inaction, Chattels real, & paraphernalia, tho he may by deed. Nor can a person in Eng by will dispose of property holden in joint tenancy, 4 Dess. 51 because the jus accrescendi intervenes between the right of the testator & that of the Devisee or legatee. But as the jus accrescendi does not obtain in C. that argument upon joint tenancy seems to be removed.

2 Bl. L. 174 — A remainder of a chattel interest may by way of executory devise, be limitted over, after an estate for life; provided the remainder men are all in esse at the death of the first devisee & that the contingency upon which the remainder is to vest happen during his life

An estate tail cannot be created in personal property: so that if personal property in Eng. is given to a man & the heirs of his body, the absolute ownership vests in the first who takes. The reason assigned for this rule by Eng. lawyers is — that an estate tail in personal property cannot be barred by a fine and recovery; therefore if supposed to exist it must be a perpetuity which the law abhors

But as by Stat of 2. the immediate issue of the first donee in tail takes an absolute fee simple in real property thus given; the reason given by Eng. Lawyers for vesting, in this case, an absolute property in the first taker, seems not to apply here; since by giving the same effect to the words "heirs of his body" in gifts of personal property as in those of real property no perpetuity is created; but the absolute ownership vests in the issue of the donee.

Wills

The age of discretion for making wills in Eng. is, according to some authorities, in males & 12 in females – others fix the age at 15. In C. the age in both sexes is 17. Idiots lunatics, madmen, & persons deprived of reason by old age, intoxication or other ways deprived in their mind are incapable of making wills. With respect to the degree of capacity requisite in this case no definition such is established. The Court generally rely on the opinion of witnesses, whether the testator varied possession of his mental faculties or not.

2. Mod. 318
Co. Litt. 89
Ree. Cham. 316

If the the testator was unable thro' ignorance, blindness or attempt to read the will the will; it must have been been read to him & such reading must be proved

generally deaf & dumb persons cannot make a will; but proof may be admitted to shew that such persons understood the contents of the will & had understanding sufficient to make a judicious disposition of his estate.

A will made under restraint or fear is invalid. And it would seem that in this case the cause of fear whether real or imaginary ought to be regarded

Wills must in writing signed & published by the testator. It is not necessary that there be subscribing witnesses to the will; & the testators name written in any part of the will is a sufficient signing. There is indeed an instance in Lovelock, where the testators name written by another person, & approved by the testator was holden to be a sufficient signing. But if the testator cannot write his name, his mark with his name by another will be sufficient

2 Blai. Com. 502

At common law nuncupative wills might be made disposing of personal property to any amount. But the restrictions imposed on this kind of wills by Stat 29 of Car. 2d have almost abolished them.

Wills

No instance of a nuncupative will has occurred in C.; Nor do we have any stat. on the subject. It is doubtful how far they might be admitted, or whether they would be admitted at all.

An ex^r may in C. be dispensed by the Ct Probate for special reasons.

By the old Eng. law if a debtor was made Ex^r his debt is discharged. But now the debt of such Ex^r is assets in the hands of the Ex^r for the payment of legacies & debts. The reason assigned for permitting the Ex^r in this case (according to the old law,) to retain his debts was that he could not sue himself; but tho this reason might be applied with equal degree of propriety to an Admr, yet they were never allowed to retain their own debts against creditors.

1 Pow. C. 438
Salk. Cas. 240
6 Br. P. Cas 79

The Ex^r as such is rep^tive legatee, unless something in the will clearly shows it was not the testator's intention, that he should be. And Mr Preston supposes that the right of the Ex^r to withhold payment of his debt against those who claimed under the Stat. of Distribution is founded on the idea, that the Ex^r is entitled to the residuum. Quere, therefore, whether if the Ex^r has such a legacy as would bar his right to the residuum, he can retain his debt against such claimants.

Rol. 920
Yelv. 160
Ch. Cas. 373
1 Sal. 305
Vide

A legacy bars the Ex. upon to the residuum only in those cases, where it affords proof of the testator's intention that the Ex. should not be residuary legatee. Parol proof is admissible to show that, notwithstanding the legacy the testator intended that the residuum should go to the Ex., but the rule does not hold vice versa.

6 Ves. C. 427
2 Atk 68. 220

It is laid down by law writers that, in cases of this kind, parol proof is admissible to rebut an equity or an implication; that is, parol proof may admitted to establish the legal import of a will or other instrument; when such import varies from the equitable construction. But such proof cannot be admitted to establish the equitable construction in contradiction to the legal import or construction: But the former must be collected from the instrument itself.

3 Atkn. 40
2. Ves. 91
1 Atk. 318
1 Vern. 473
1 Ch Ca 201. 328

The methods of revoking Wills & Devises are the same.

Wills

If, after judgment recovered & execution against an Ex., for the debt of his testator, he neglects to make payment, the creditor may come thereon in scire facias & in this second action, the Ex. can plead nothing of what he could have avail himself of in the former action. And if in this latter action judgment goes against him the execution is de bonis propriis

Salk 304, 6, 7

The Ex., after having done any act which would make an Ex. de son tort. cannot refuse the executorship

When one is appointed Ex. he must, when summoned, appear before the ordinary to signify his acceptance or refusal and in refusing he is excommunicated.

In C. Ex. must appear before the Ct. of Probate to accept or refuse his appointment within one month after he is notified of it, without summons. On failure he is liable to a penalty of five pounds a month

2 Rol. 907

If an Exr is appointed & an Exr appears afterwards with a will; administration must be repealed and the Exr must assign to the Exr whatever property belonging to the testator he may have in his hands. It is doubtful in C. whether the whole proceedings of the Exr are not, in this case, absolutely void.

Lepelep 19. 20. 50

2 Bac. 111

When there is but one executor & he refuses, he cannot afterwards claim the executorship & prove the will. But if there are two, one of whom refuses & the other accepts, the former may prove the will & assume the executorship at any time during the life of the latter

3 Rol. 37

By the Eng law if one of two Exrs refuse the other when he institutes a suit must still name the one who refuses; tho in fact he acts as an Exr there is no need of naming both. In C. it is sufficient in either case that the acting Exr is named.

If A. appoints B. his executor & dies & B appoints C his executor & dies C. is Exr of A. In this case C. can not accept the executorship of A & refuse that of B. that he may accept that of B & refuse that of A.

Wills

If J. S. dies leaving two Exors A & B. & A dies leaving one Exor C. C is not Exor to J. S.; but the authority rests solely in B. the surviving Exor of J. S. But if after A's death B also dies leaving D his Exor, to J. S. he is also Executor. If C & D had in this case, died intestate there would have been no Exor to J. S. & administration de bonis non cum testamento annexo must have been granted.

Of Devastavit

Any act or negligence of the Ex^r or Adm^r by which the effects are lost or injured subjects him to a devastavit, or such execution goes de bonis propriis; as, releasing debts or discount, submitting to arbitrament & accepting less than was due, expending an unnecessarily large sum for funeral charges, suffering the the decease to be injured or destroyed. So When in those cases there is a bond given, he may be charged the bd.

It is a question whether a devastavit will lie in C. agst an Ex^r or Adm^r since, if a creditor succeeds in this action he can recover to the whole amount of the original effects & thus defeat the average law. The proper remedy in this case seems, therefore, to be an action on the bond.

If there are two Ex^rs one is not liable for a devastavit by the other unless he has directly or indirectly contributed to it. In a devastavit is in the nature of trespass.

Devastavit

2 Ray 1320

If of two Exors one has assets & the other none & the former has committed a devastavit, both may be sued, in the first instance & judgment may go agst both. But if no assets are found a non est will be returned, & scire facias will go agst both & then judgment will go against the receivers of assets only. In C. execution will in this case go agst both.

11. Vin. Ab. 306
Brown. 33 Anon.
Noy. 129. Hob. 167

If an Exr or Admr pays a bond made on a usurious contract it is a Devastavit – 2 Bac. Ab. 431

1. Salk 318
2 Rol 114

If both Exors have signed receipts & one only has in fact received, both are liable to Creditors, but it is said that the receiver only is liable to legatees

No. 6.

Of Forfeiture of Administration Bonds

If the Adm. (and in C. the Ex.) does not inventory, or if the master exit a false inventory or does not account he forfeits his Bond. But the non payment of a debt is no forfeiture in Eng. or in C.; nor is a devastavit in Eng. But whether would in Eng. be a devastavit is here a forfeiture of the bond — Non distribution of bonds, is also a forfeiture.

No. 7.

When the Ex. is an infant or absent, or refuses the executorship, or dies before probate of the will, administration cum testamento annexo must be granted; and the acts done by the administrator are, in that case, valid. If an Ex. having proved the will, dies intestate, Administration de bonis non cum testamento annexo must be granted.

The method of recovering legacies in Eng. is by bill in the Ecclesiast. or by bill in Chancery; but if charged upon land, by bill in Chancery only.

Expositure of Adm.rs Bonds

In C. a legacy is recovered by action in com. law Courts. If in C. legacies are charged on lands given to a devisee, the Devisee is liable to the Legatee in Courts of com. law.

Divide

The Exr may sue in his own name when the cause of action is founded in contract of his own, or has accrued since the testators death

The Exr then sued for a debt of his testator is not obliged to take advantage of the Stat of limitations. But if he thinks the claim just, may suffer judgment to go against him without being guilty of a devastavit

1 Atk 524

Whether an Exr is under obligation to take advantage of the Stat of usury is a question on which the Eng. authorities do not agree. This, it is settled that, in general, he is obliged to avail himself of any illegality in the consideration of a contract. But it is doubtful whether this rule extends to debts, which in honor and conscience ought to be paid. The Exr is not perhaps, warranted in waiving all the legal advantages which his testator might.

Forfeiture of Adm.rs Bonds

It is a rule of Eng. law, that there must be three witnesses to a Proofe. But to the validity of a will no witnesses are necessary.

If the testator bequeathes his real & personal property, by the same instrument & there are no subscribing witnesses, it has been holden that as to the personal property the testament is valid; but as to the real is void. But it would seem that if the testators intention is to be pursued ought to be valid or invalid in toto. Or otherwise the intention of the testator will, in almost every instance be defeated.

When an action is brought against an Exr de son tort, he is named in the declaration as "Exr on the last will & testament &c" & this is the form whether the decedent died testate or intestate.

In C., as real & personal property are both assets in the hands of the Exr, the heir, as such, is not bound by specialty debts; since the Exr himself is liable. It is of no avail here to mention the heir, in specialties, for the land is bound of course. But in certain cases the heir may become liable not only to debts by specialty but also to simple contracts debts in the principles of equity, that creditors may pursue assets in the hands of whatever persons may have them. As if the Exr has become a bankrupt, or if by any means, no remedy can be had, but against the heir.

Forfeiture of Adm.ⁿ Bonds

By one clause in the Stat. of 6. it seems that in one instance there can be an Ex de non tort: But, as no provision is made respecting him in any other instance; & as the existence of such a character would tend to defeat the average law. Mr Rivers supposes, that in other cases, there can be no such character in 6.

An appeal from the decisions of commissioners is not allowed in C. in favour of creditors, or against Ex^r or Adm^r, except in one instance, viz. when a claim has been allowed in favour of an Ex^r or Adm^r. For in this case, the Ex^r or Adm^r being the person, whose claim is disapproved, cannot himself bring an appeal. But against creditors appeals have always been allowed.

If a Testator take a lease & covenants to pay rent for so years & dies; & after the estate is settled & assets in hand & distribution made, rent becomes due; the Ex^r or Adm^r is liable. But in this case, Equity would probably let in the Ex^r or Adm^r against those who need distribution claims.

Forfeiture of Adm.rs Bonds

In C. if the creditor attaches property of the testator, before or after judgment, the testator dies, it is questioned whether his creditor has not a lien on the property attached so to hold it in preference to other creditors. He would clearly have a preference in this case if the Stat had not expressly provided, that judgment debts should not be preferred to others; Tho notwithstanding this provision it seems improbable, that the Stat intended to defeat such a lien. A mortgagee, is, in similar cases, allowed to hold, to the exclusion of all other creditors, the land mortgaged. And, in the case of the attachment, if execution has been issued, there is no doubt but that the lien is good. There, seems, indeed, no substantial reason why it should not be so in the case first stated.

Of Contracts

I Of Bailment

Bailment is divided into 6 species.

Cogs vs Bernard L'Roy. 909 &c

1 — A delivery of goods for safe keeping without any reward, a naked bailment called in law — depositum — 2 Lending gratis, or accomodatum — 3 — Lending for hire or locatio et conductio — 4 — Goods delivered as a pawn — 5 — Goods delivered to one who is to carry them for the same, or do some work respecting them for hire — including the case of common & special carriers factors &c — 6 Goods delivered to be carried gratis —

gones Bailments 5 species or heads

Mr Reeves supposes that the whole doctrine of Bailments (except the doctrine of pawns which he considers distinctly) may be properly divided into three branches: — 1 — of the first case of naked bailee — 2 — of common bailee — 3 — of common carrier.

Contracts – Bailment

If property is intrusted by one man to another, the purchase of that property from the bailee shall in some cases be good against the bailor; in other cases not good. If even horses are left by a creditor in the hands of his bankrupt debtor, & the bailee sells them, the sale shall bind not only the actual owner, but his ostensible likeness. The reason given for this rule is, that the creditor has put confidence in the bankrupt & enabled him forth in false colors as to property; whereas the purchaser reposed no confidence in the bankrupt.

3 Atk. 44

1 Ves. 5-18

A horse lent to one to ride a few miles & sold by the borrower may be retaken by the original owner in whatever hands he may find him. So jewels sold by one in whose custody they been left for safe keeping may be reclaimed by the original owner

Cattle, intrusted to a person to be driven to a particular place, & then driven to another place & sold may be recovered by their real owner

The general rule, (so far as any general rule can be framed,) which governs in these cases appears to be this: That if the time & circumstances of the bailment are such that a sale of the property will probably infer, or are such as to afford third persons ground for believing that the bailee has the actual ownership of the property, a bona fide purchaser will be secure. Otherwise the bailor may retain the goods bailed, & sold.

3 Atk 444

2 Ves 348

If a horse is stolen & sold, the original owner may claim & seize him in the hands of a vendee. In where there is the same equity in favour of two claimants, the prior title shall prevail. But if there is greater equity on one side than on the other, he, who has the greater equity, shall be preferred: if a horse is procured by fraud & sold, the vendee shall be secure; for the original owner is chargeable with some degree of fraud or negligence in suffering his property to be thus taken.

Held

Constitution — Bailment

It has been determined in C. that if a cow be let to a poor man, he with her, the said does not divest the right of the bailor. But if ten cows had been let the esq. had been otherwise.

By adjudications of the S. Ct in C., if property, lent to a son in law by way of on the marriage with the eldest daughter, be sold by the son in law, then title of the father in law is not divested. But these adjudications do not seem to comport with the general rule.

If the property of a bankrupt debtor is left by the creditor in the hands of the debtor, the bona fide purchaser is safe, and if any person, not acquainted with the transaction, gives credit to the bankrupt, with that property remaining in his possession, the person so trusting may indemnifiedly seize the property in satisfaction of his demand. The reason is, that the property in the party

sion of the bankrupt gives him a credit with a third person which the other wise would not have had. If prior creditors, knowing the state of the property has, in their opinion no right to levy upon the property. But if, without knowing it, the lenders, Mr Rivers supposes that, in justice he ought to hold it, because he might otherwise be put to great expence by the deception arising from the bailment. But Query de hoc

All sales actually fraudulent are void against prior creditors & honest purchasers, but against subsequent purchasers knowing the circumstances, such fraudulent sales or gifts shall be good. Sed quere de hoc

If of no notice is given, or no knowledge is given of the sale or gift can be presumed, subsequent creditors trusting the vendor or grantee, on account of the property thus fraudulently transferred, may maintain their claims against such vendor or grantee.

Sheriffs & Gaolers, Innkeepers, Common carriers, are bailees who are liable for any failure in the execution of their sacred trust unless such failure happen by the act of God, or inevitable accident, which is the same thing, or by the open enemies of the land.

The Sheriff is bailee of the body of man taken in execution, & is liable to the creditor if the escape, except in the cases above mentioned.

Escapes are either voluntary or negligent.

In cases of negligent escape, the person escaping may be retaken. But if there be a recaption on fresh pursuit, before the creditor commences a suit against the Sheriff, the Sheriff's liability is purged. But recaption after an action commenced does not excuse the Sheriff.

Rol. Ab. 808. 809

Stang 873

The creditor is under no obligation to take his remedy against the Sheriff, he may pursue the debtor who has escaped; and then whether the escape is voluntary or negligent. But by taking his remedy against the debtor, he loses his right against the Sheriff.

2 Wilf. 294

2 Vent. 289

For negligent escape permitted by the Gaoler the Sheriff is not liable to a fine, but the Gaoler is.

The liability of the Sheriff is a sufficient source of action ~~and~~ in favour of the Sheriff against the person having escaped from prison. It has, however, been a question, whether the Sheriff can maintain his action against the prisoner before he has sustained damages by an action by the creditor. The decisions of the Eng. Courts are uniformly that his liability entitles him to an action immediately without waiting till he sustains actual damages.

Ld Eliz. 53

A voluntary escape subjects the the Sheriff at all events to answer to the creditor without the right of recoupment or any other remedy. For an escape of this kind the Gaoler is liable as for a wrong; but for negligent escapes the Sheriff only is liable. He has even been

Salk 18.

question, whether, after having set him at liberty, he might check the prisoner voluntarily return, claim him in prison. It is generally agreed that a Sheriff may in this case retain the prisoner. Quer Has the Sheriff no remedy agst the prisoner whom he has voluntarily suffered to escape

Esp 612 when he has paid the debt to the debtors

It has been a question whether if a prisoner who has the privilege of the yard, passes the limits of the yard, it is a voluntary or negligent escape. Mr Chitty is of opinion that it cannot be called a voluntary escape. And this opinion has, with a single exception been adopted by our S. Court.

Cro. James 289 Cro. 769 For an escape on a action on the case, or of debt will lie agst the Sheriff.

At com law the Sheriff is liable in an action of debt to the creditor for the escape of his debtor in execution. This liability is, under the equity of the Stat. which expressly embraces Mesne Prison

Damages, in an action of debt, must be to the extent of the execution. By the decisions in our Courts, in an action in the case damages may be less. Mr Chitty thinks that on principle, the same rule of damages ought to obtain in both cases.

The right of action for an escape does not invest the death of the Sheriff.

By the Eng. authorities if the creditor elects his debtor on execution he loses his debt. In this there appears no good reason —

If, of two joint debtors imprisoned on execution, one escapes, the other, it seems by the decisions of the Eng. Cts. must be discharged. This, I suppose, is true in no other than voluntary escapes: and even in these cases, it is not easy to see substantial reasons, why both should be discharged.

The privilege of the Rand allowed prisoners is founded on no stat, but intirely on custom. This matter is regulated by County Courts.

Outlawry — Bailments

Provision is made by Statute that in case an imprisoned debtor will make oath that he has not property of any amount above five pounds of any kind, nor enough to pay the debt, nor to pay the debt for which he is imprisoned, he shall be discharged from prison. But the creditor may in this case retain him in prison if he will maintain him then at his own expense. By construction of this Statute, such property as is exempt from execution is to make no part of the five pounds.

The law in C respecting Sheriffs somewhat from the law of Eng. - In C. the County is in some cases liable, & the Sheriff not liable, where in Eng. the Sheriff is to be liable & the County or Bailiwick not. - If an escape happen thro' the insufficiency of the gaol, & without any negligence in the Sheriff, the County alone is answerable to the creditor. But insufficiency in the gaol does not excuse the Sheriff, if he has not kept the prisoner in the safest manner the gaol could admit -

The Decisions on this have not been uniform as to the damages for which the County should be liable in case of an escape in consequence of insufficiency of the Gaol. There is therefore, in this case no established rule of damages in C.

The mode of pursuing the remedy against the County is not the same as that against the Sheriff, by suit in any Court.

The Sheriff is liable for the escape of one whom he has taken on execution and not committed to prison. But it has been adjudged by an Ots that acceptance before the expiration of the execution or 60 days exempts the Sheriff from his liability.

The law is not the same in case of mesne & final processes. It is sufficient in case of mesne process, if the officer have the party before the Ct at the time required.

2 Wms 297 A rescous returned on mesne process is a sufficient justification of the Sheriff. Nor is the rule of damages the same as in case of final process. The real loss of the Pltff by the escape is all that can be recovered against the officer. But if the prisoner has been actually committed & escaped, the Sheriff is liable in the same manner as if he had been committed on final process. To this rule our practice is an exception.

Contract — of Innkeepers

The law respecting Innkeepers is the same as that respecting Sheriffs & Gaolers.

In l. Innkeepers are nominated by the selectmen & other officers of the town, & being thus nominated, County Court appoints them. They are obliged to entertain people, & for upon are liable to an action on the case

8 Rep 32

The Innkeeper is liable at all events for any injury which may happen to the goods &c of his guests while in his profession. The only instances where an Innkeeper can excuse himself for the injury is when it happens by the act of God, or the kings enemies.

8 Rep 33

But if the property be injured or stolen by the guests servant or companion the Innkeeper is not liable. The same is the case, if the guest conceal it from the innkeeper at the time of its being lost, that he has lost property: And if the host is informed by his guest as to the value of the property committed to his keeping, by the amount of an action, he is liable in damages for no more than that sum which the owner affirmed to be the value of the property.

Nor is the innkeeper, however, responsible for property not belonging to his guest; unless it is property from the keeping of which he expects some profit.

Cro. J. 189

What a man may be a guest he must be a traveller. But tho' he be at the end of his journey & lodges at an Inn for several days, if it be in character of a stranger, & at the tavern price, he is a traveller.

Insanity nor infancy can excuse an Innkeeper from liability

Cro. Eliz. 622

Sickness in his family — that his house is already full &c are sufficient excuses for not taking in a guest. But if to oblige a traveller he admits him, after his house is full, to sleep by his fire &c the Innkeeper is not liable as in cases of guests.

Decisions of the Courts in Connecticut on various questions —

It was decided by the Court of Errors May 1796 that an appeal lies from the Court of Probate, if the latter accept a return of commissioners not according to this as will in favour of a creditor as an Exr. The appeal is not from the commissioners as a Court. The objection urged was that the Ct of Probate was ~~that the~~ obliged to accept the report & therefore it was not their proceedings

Avide

Decided at the same time that relief granted by the Supr. Court in Chancery against a contract made by a person of weak mind and addicted to ebriety, & probably intoxicated at the time of making the contract, was erroneously granted. This decision of the Court of Errors was made on the ~~ground~~ grounds that the party had a remedy at law. —

Some Decisions of the Ct. of C.

It is a privilege allowed Innkeepers that they may retain the person & the property of their guest till their demands are thereon satisfied. If the guest escape he may pursue & take him; but the recaption must, or in case of an escape from a Sheriff, be upon fresh pursuit. The rule as to what shall be deemed fresh pursuit is that, if it does not appear, that the Inkeeper, had abandoned his right of recaption, it is considered as fresh pursuit.

In an action against an Innkeeper it must be stated generally that the Pltff was his guest; but need not be stated particularly.

Tailors have been allowed to retain clothes & Blacksmiths horses, till they are satisfied for their labour which they have bestowed on them. But this rule does not apply to tradesmen generally. The rule appears to be, that, if the labor was done on the personal credit of the employer, there can be no retaining the property.

Some Decisions &c &c.

8 Rep 326 If one who does not keep a common Inn lodges a traveller he is not liable as a common Innkeeper

8. Rep 326 The Innkeeper is answerable for nothing which is not infra hospitium; as a thief put to pasture at the direction of a guest

Co. Car. 109 No action lies agst the Executor of a Sheriff for an escape. But if a Sheriff has levied money on Execution, his executors, after his death, without payment to the creditor are liable.

Co. Car. 589

Co. Car. 109 In case of a rescous the Party may sue the Sheriff or those by whom the rescous was effected.

A suit agst an Innkeeper must be on the case by the custom of the realm. —

Of a third kind of Bailees who are at all events liable.

A third kind of bailees who are at all events liable are those for injuries which may happen to property committed to their charge are common carriers. Under this Description of Bailees all those make it their business to carry for hire; such as Post Riders — Proprietors of Stages, Masters of Packets — boatmen — ferrymen &c

Hob. 18
2 Vent. 78
1 Vent 190. 238

The proprietors of a Stage coach, or the Master of a Stage coach is not chargeable with the loss of goods, committed to the driver; unless the master or driver takes a price for carrying the goods

Salk. 282

The car of a Sheriff is not liable for escapes; but the car of a common carrier for lost or injured goods —

Bailee or allowance liable

In some cases it is a very nice point to determine whether the loss is by inevitable accident, or the same fault of the bailee: As if a storm occasion a vessel to spring a leak, by means of which goods are damaged. In this case, it might be a question whether the vessel was not insufficient & such as that the goods ought not to have been entered on board her.

1 Wilf. 281 — Proof that the carrier used all possible care is not admissible. But testimony, that the loss was by some cause, beyond the reach of human foresight & prudence to discover & avoid, is admissible. As that the boat was struck with lightning, or overturned by a sudden gust of ~~tempest~~ wind

A com. carrier may except especially;

1 Vent 238 — & in case of a special acceptance he is bound according to the terms of his acceptance. And if he is misinformed as to the value of the thing which he undertakes to carry, or that it is something of small value, when it is of high value as money jewels &c he is not liable: if the case

1 Burr 2298 — of fraud is & is known to be, that the premium

Carth 485 — for carrying money is greater than that for common carriage. And if he is not truly informed as to the value of the jewels, or the sum of money, he shall be answerable for no greater sum than that which was told him or being the contents of the goods

Bailee at all events liable

1 Ld 245

The remedy against the common carrier is, as in cases of Innkeepers, an action on the case upon the custom of the realm. Trover will not lie.

There is no question that, in cases of vessels lost at sea, or in danger of being lost, the casting goods over board, or extremity is not a loss which subjects the carrier: But the law on this point with respect to hoymen &c is not settled.

II. Naked Bailment.

L'Ray. 907 A second species of bailment is called naked bailment. In bailments of this sort the liability of the bailee is not grounded on his negligence, but on his fraud only. To make a naked bailee liable the negligence must be so great that it affords grounds of presumption that there is fraud in the case. It might, indeed, as well be said that fraud & fraud only subjects the naked bailee. But this applies only to naked bailees to keep.

Com. Dig. 133

A naked bailee, even in case of an express promise to keep safely is not liable for loss occasioned by the wrong doing of another. This rule, Sir Wm. Jones say is too broad or too general; for wrongs, when the bailee is concerned, ought to be confined to such as are unaccompanied with force or violence

Jones B. 63

2 A claimant against property bailed cannot maintain his action against a naked bailee, but against his bailor he may. One who finds a thing is in all respects a naked bailee to keep. This was the law formerly

Yelv. 4. 30. 128.

2 Ro 667

Lord. Bailment.

But one who undertakes to do something with property committed to his charge, or to transport it from one place to another, is liable for less than his negligence; tho he has no reward for his trouble.

L Ray 909

Salk 26

III Common Bailment.

A third species of bailment is called common bailment; – including borrowing for use where there is no reward – carrying of things for a reward by a person who is not a common carrier, or who does not make it his duty or business to keep for others. In any of these cases, negligence subjects the bailee.

If one, who borrows gratis, or hires for a price, exceeds the purposes of the bailment, he is, at all events, liable for loss or injury which may come to the thing bailed; unless it can be clearly shown, that the loss or injury would have happened without the wrong in the bailee. But if the injury is, in no way, the consequence of the bailee's wrong conduct he is not liable.

The wrong conduct of the bailee in using the thing bailed otherwise than by the terms of the bailment, he ought, is not, by the current of authorities deemed a trespass. But if the bailment is fraudulently obtained with a design to abuse; query, if trespass would not lie for the same reason that it would be theft if obtained animo furandi & sold or otherwise disposed of by the bailee. If however, the wrong intention did not exist at the time of making the bailment, but was subsequent, there can be neither trespass or theft.

1 Rep. 89

If an injury is done to property in the hands of a bailee by any person a right of action against him who does the injury accrues to either the bailor or the bailee. But a suit by the bailee for the loss of the goods, or the special damages to himself supersedes the right of action by the bailor agst the wrong doer. The same is not true with respect to the bailee if an action is brot by the bailor; for a right of action for special damages still remains to him. This violation of property by the bailor himself gives the bailee a right of action for his damages.

1 Vez. 94
9. B. 3 H. 8 56. 6. 5 p. 6
4. B. 19 H. 6. 19
D. 18. 6. 7: 9
1 Rol. Ab. 10
Bro. Ab. title action on the case 72
Cro. Eliz. 136
9. B. 4. 8. 11
Jones B. 76

A distinction is taken between a total failure to perform a thing, undertaken without consideration, & a negligent, or ill-effected performance of the thing so undertaken. For a culpably negligent performance of an undertaking, there seems to be no question, but that an action lies for such damages as arise therefrom. It is held by some that a total failure of performance of the undertaking subjects the undertaker to an action in damages for the failure which produces those damages.

Pawns

If there is expence in keeping the pawn the pawnee may use it.

Salk 522

In several decisions it has been adjudged that refusal to deliver a pawn upon tender of money to the amount of debt & interest is a crime.

Salk 522
Carth 277

Best, quere, if an indictment can be maintained?

1 Hawk 210 this doctrine is questioned; tho there may be two decisions contradecting it

1 Hawk 210

After the pawn by the contract vests in the pawnee, he is entitled an equitable interest in the pawn. The pawnor may redeem of the pledge; but he may 2 account with both the pawnee for that sum which the sale of the pawn affords over & above the money the debt & interest due the pawnee. And if he greatly undersells the pledge, he is wrong, & he is liable to account for the value, beyond the just satisfaction of his debt. To recover this over plus the Ct. think that an indebitatus assumpsit would lie. Pledges which are not in use may be used by the pawnee but it is at his risque. Loss of pledge happened which would not probably have happened had it not been for the use, the pawnee is absolutely liable for the loss. Other pledges may not be used.

Salk 522

Co. L. 206 By tender of the money for the payment of the debt the right of the pawnee is divested; and retention of the pawn after such tender is trespass. It likewise subjects the pawn to all events to damages if injury happen.

The debt is in this case pleaded on the same ground by the tender, as debt can in other cases by a tender of money in payment. But the money tendered vests in the tenderee, & must be kept by the tenderer, who becomes bailee to the pawn.

1 Bulst. 29

In case the pawn is assigned it is a question to whom the tender must be made. Mr Ch thinks that if the debt or ward on the pawn is assigned, the tender ought to be made to the assignee. ch contra

1 Bulst. 29

A pledge is not liable to be taken for the debt of the pawnor. But the creditors may have the same advantage, which they would have, if no pledge had been given.

If there be a time limited for the redemption of a pawn, & before the expiration of that time the pawnor dies, his Exors shall have a right to redeem. If no time is limited the pawnor may redeem at any time during his life, but his Exors cannot claim a right to redeem. Comyns is of opinion that the right of redemption extends, in this latter case to Exors. Mr R. supposes that neither of these opinions is right; but that when there is no time limited, it should be such time as would be adjudged reasonable

Co Litt 178

Co Litt 209

Co Litt 39

Mortgaged property in the possession of the mortgagor if it had been upon false colours, inducing persons to give him credit, is liable for his debts.

By our Cts it has been adjudged, that property lent a son in law is not liable for his debts.

A pledge does not deprive the creditor of an action against the debtor

Strang. 949.

Of Contracts

1 – Of persons who are not of ability to contract & who have the privilege of avoiding their contracts

2 – Of contracts in the making of which there is error or fraud.

3 – Of illegal Contracts

4 – Of Contracts which are void because idle or impossible to be performed.

5 – Of Contracts which are void because not committed to writing

Persons whose contracts are ab initio void or capable of being avoided, rescinded or set aside by themselves or others, are feme covert, infants, idiots, lunatics, intoxicated persons, & persons whose intellects are weak to an ununcommon degree.

Contracts

The inability & privileges of infants and feme covert, with respect to contracting have already been considered sec 1 Fonb. Eq. 80 Chap. 1. of Infant Sec. 4

1 Fonb. Eq. 404 A person being indispensable in a contract, idiots, who are incapable of giving a person, are totally unable to contract. See this subject ably handled in Fonblanque Eq. 404 Cap. 12. Sect. 12. 83.

The same is the case with Lunatics. Their contracts are voidable only, And in the Eng Courts of law a rule has obtained that a man shall not himself plead his own disability to avoid his contracts. But by a circuitous proceeding advantage of such inability may be taken in a Court of Equity. He then, however, may take advantage of the idiotism or infancy of his ancestor to avoid any of his transactions, except such as are of record, which are valid against all persons; because as the Eng lawyers say, the record furnishes the highest evidence that the person was capable of performing the transaction

Co. Lit. 3 98
4 Rep. 123
Co. Lit. 2 4 7
1 Fonb. Eq. Cap 2. Sec. 3. page 56 &c

The law in C. is more reasonable, allowing to avoid such contracts, as were made by them when not of sufficient understanding & discretion to transact such business. But both in Eng. & Con. such persons of disordered minds, or have a lucid intervals, are bound by the contracts which they make during those lucid intervals

2 Ros. 123.

10 Lit 247

Drunkenness is a species of inability of which a man may in some case avail himself to avoid his contracts; but, in general, it is no excuse to invalidate the obligation of his contracts. If an unequal bargain be obtained of a drunken man, by one who had contributed to get him drunk, for the purpose of making a contract, it is of no validity. It is a question whether, if some late advantage of a drunken man's intoxication to gain an unequal bargain, will not be set aside on the ground, that what is acquired by taking advantage of an others intoxication is wrongfully acquired

3 Atk. 390

Contracts

If a person of weak intellects, tho not legally an idiot, give a bond for what there appears little or no consideration, & when there appears no sufficient reason to have induced a voluntary donation of the thing which is given by the bond, a Court of Equity will relieve against such a bond upon the presumption that it was fraudulently obtained.

3 P Wm. 130

Chancery has sometimes interposed to set aside contracts made by persons in extremis.

It is a general rule that there must be an object to receive property before it can accrue in a donee; yet a grant of property to idiots & lunatics has operation so far as that it becomes the grantees until he recover his understanding & refuse to accept: As the heir of the grantee may refuse, in case his ancestor has not refused to accept the grant.

Ignorance is, in certain cases, a good reason for relieving against contract.

2 P. Wm. 316
1 P. Wm. 728

If one chap a right which was more extensive than he supposed, & does it for an inadequate consideration, Chancery will in such case grant relief. But the sale of a farm for half its value, because the title of the vendor is that doubtful by himself, is not a case in which Chancery will interfere, tho the vendor's title was in fact good. If the vendee at the time of the purchase knew that that the vendors title was good, a Court of Chancery it is that would interfere. But this would be on the ground of fraud in suppressione vei

Even when one has the ignorance of the law, which it is said is the business of every man to know, parted with his right, Chancery has in some instances granted relief. As if one affirm a promise obtained by deceit, which the law allows him to avoid, upon the supposition that his promise was good in law, such affirmance is of no validity.

Contracts

If to the acceptor of a bill or maker of a note time is given by the indorsee after the bill or note has been dishonoured, the indorser is discharged

1 Burr 167

If one leaving an interest in any property or estate is privy to the making of another interest in the same property to another person & does not disclose to the latter the true situation of the property, the interest of the latter will be preferred to that of the former

2 Vern. 151. 239

A release for a trifling consideration to a Devisee under a will defectively executed, the Devisee pretending the will well executed, was set aside

1 P. Wms. 239

Of the effect of fraud upon bargains & sales both in Law & Equity -

Fraud in sales is said to be by false warranty, false affirmation, or by concealment of defects in the thing which is the subject of the sale. There seems however, in strict propriety of speech, to be no fraud in a false warranty.

Ex. Jam. 197-4 The sale of property in possession is an act of ownership, which implies a warranty by person who sells, that the property is his own. Mr R is of opinion, that the case is not altered if there is not possession. This is the case only in the sales of personal chattels. In sales of real estate there must be an express warranty, or there is no liability.

Salk 210

Ex. Jam 690 It is essential to the validity of a warranty that it be made at the time of the sale. Warranty previous to the sale will amount to no more than a mere affirmation; & warranty subsequent to the sale is of no validity.

Shag - 1 Ves Dyer 76

A warranty is not construed to be against defects so obvious, that they cannot without considerable negligence, escape the notice of the vendee. But a warranty extends to an obvious defect which from the time or the particular circumstances of the vendee might be well be unobserved.

1 Ad. 91 — False affirmations concerning a thing to be sold, by which one is induced to buy, gives a ground of action of a seller who makes the false affirmation. But an affirmation as a mere matter of opinion, as that a piece of tapestry of such a value, a a harp worth so much, is not a deceit which entitles one to an action. To give a right of action there must be a false declaration concerning matter of fact: as when the seller affirms that a certain piece of land rented for some annually, by which the buyer was induced to give for it a greater price, when in truth the annual rent was not so much.

Ro. J. & Contra 569

1 Ad. 101 91. 96

2 Dun 54

If a vendor sells for a full price, knowing that there are defects in the article of which the buyer is ignorant, it is a deceit which entitles the buyer to an action.

An action on the case for damages is the proper remedy in case of false warranty false affirmation concealment of defects in an article sold for full price. Indebitatus Assumpsit in trover will not be sustained. But one or other of these actions, or the case may be, will lie if the fraud is total, so that nothing is in fact given by one of the parties, or acquired by the other; or if the property is acquired by some trick or cheat, without a sale, indebitatus assumpsit may be sustained to recover money & trover to recover a horse or such like property

Fraud in the execution of a bond or deed vitiates it; and the remedy, in such case is the same both in law & Equity.

Doug. 23

2 Rep. 5

Effects of fraud on contracts in S.E.

Equity will rescind a fraudulent contract, if the fraud is total. But if the fraud is partial, Equity will not consider the contract as altogether void; but will grant relief to the extent only of the fraud.

Fraud in the confirmation cannot be pleaded in bar of a recovery on a contract; but if total, our Courts have allowed it to be pleaded. The practice is, however, of late date; and no adjudication of the S.C. E. has sanctioned it.

In cases of fraud Chancery will not interfere to grant relief; but will leave the party to use his remedy at law; unless this latter remedy will subject the party to irremediable, which may be avoided by interposition of Chancery.

Fraudulent gifts, grants, conveyances & sales are void agst creditors. It renders not the contract the more valid that the purchaser has given the full value of the property, if the purchaser was made with intent to defeat the seller's defrauding his creditors. It has been contended by sur-geons, that if a vendee gave the full value of the goods, there is no fraud, tho the vendee had knowledge that the sale was for the purpose of defrauding vendor's creditors. This doctrine was obtain. By parity of reason, the idea of fraud, in ref of a partial consideration, extends no farther than the value of the property sold exceeds the consideration given.

Cowp. 434

3 Rep. 80

A conveyance of property to a bona fide creditor, tho it falls short of the debt of such creditor, is fraudulent agst creditors; if the property is left in the hands of such debtor, & in such circumstances, that the conveyance appears to be a mere trust.

3 Rep 81

Effects of fraudulent Conveyances &c.

It has been a question in Com. whether fraudulent contracts, or grants are void against subsequent creditors. The negative of this question if once established for law, would operate to defeat the policy of the law, which is to preclude the grantor from reaping any advantage from the property so conveyed. By the stat. 13th Eliz. which is said to be in affirmance of the com. law, such conveyance is void against those creditors who were designed to be defrauded by it.

There may be cases in which a conveyance of the property to hinder it from the hands of creditors is valid. It has been adjudged by the Supr. Court in Com. that one, whose personal estate is insufficient to discharge his debts, may, for the purpose of keeping it from his creditors, may convey a favorite spot as a burial place or the like, provided he leaves other good estate sufficient to discharge all his legal debts.

A voluntary conveyance is fraudulent against one who claims under a subsequent conveyance by the same person for a valuable consideration adequate to the value of the property conveyed; the conveyance being presumed designed to defraud, hence ~~fraudulent~~ voluntary. By Stat 27 Eliz. 4 voluntary grants, with intent to defraud subsequent purchasers are declared to be void. The action not the ceq with respect to fraud that the purchaser has no knowledge of the fraudulent conveyance.

3 Rep. 83

Ca Eliz. 4 Ch. Cases. 712

5 Rep. 60

The purchaser of a voluntary grantee, who for a valuable consideration does not avoid his sequence to the gift voluntary grantee

Cases 302

2 Ch. Rep. 25

A voluntary conveyance may in some cases be valid against creditors. When the conveyance is made for good consideration with no intent to defraud, it will not be set aside in favour of a creditor; if at the time ~~and after~~ the making the voluntary conveyance the debtor had other property out of which the creditor might have satisfied his debt by using due diligence. But the Ct think that a creditor will not be postponed to a voluntary grantee, unless he has been guilty of some degree of negligence.

Cases 684. 708

Notes of Mansfield's Commonplace Book

1 Sid. 146
3 Mod. 261

In an action of Deceit scienter false et fraudulenter are necessary words in the declaration.

The verdict does not remedy the want of essential allegation in the declaration; but a defective statement of an allegation is, after verdict, good.

Chancery will not interfere to grant relief against imposition which are the consequence of gross folly & of gross negligence in the party who applies for relief.

3 Wm. 294

Fraud in the contract is said to be the ground on which Courts of Chancery grant relief; but it is difficult to discover, in many cases, that into Chancery, where the fraud exists. Oppression in a contract is a sufficient ground to warrant the interposition of a Court of Chancery. What has been above said of fraud ~~also~~ relates principally to cases in which the fraud was in the seller, or in both parties with a design to defraud third persons.

1 Wils. 229 — A contract by which one fraudulently gets the property of another at a less price than its true value Chancery will relieve against it.

1 Lev. 111. — An inadequate consideration in a contract seems to be a good ground for relief in Chancery.

1 Ch. R. 118 — If one take the advantage of another's intention to make him covenant to do a thing which is to his disadvantage such covenant is not obligatory.

1 Vern. 348
2 Eq. 375
2 Salk 156 — Contracts which are fraud upon third persons, tho equitable between the parties, are void. Such is the case of marriage settlement in which the father of the young man would not consent to the marriage unless the father of the young lady would settle upon his daughter a certain sum, in which the father of the young man insist. settle a certain sum. The bond of the young man to pay back to his father in lieu a part of what he should receive upon the marriage of the daughter is of no validity.

Effects of illegal contracts in L. Law

For the same reason a bond or other obligation given by an insolvent debtor to any one of his creditors a larger portion of his debt in case he will agree to compound with him, as his other creditors are willing to do, is void

All contracts which are against the public good, or sound policy are void. Such are marriage brokage bonds, & bonds not to receive a tithe, or cultivate a piece of land in the manner which would render it most productive.

11 Rep. 53

Purchases of expectant estates of young heirs are void for the same reason. But it seems that such purchases must be unreasonable or they are not void.

1 Atk. 310

1 Com. Ca

Of Duress

In an action brot on a simple contract, duress may be given in evidence under the gen issue; but if the contract is clothed with a sealed non est factum cannot be pleaded to the bond or bill, but the duress must be specially pleaded.

5 Coke 119

There is duress of imprisonment & duress per minas. Duress of imprisonment is either by an illegal imprisonment, or by unjustifiable detainment of one legally imprisoned

1 Lev. 68

Imprisonment by due process of law, tho without just cause is not false imprisonment, & consequently not duress But every imprisonment, not by legal process is a duress.

9 Wm. Bl. 320

Eng. Authorities do not agree whether the imprisonment of another not a wife, is such a duress as shall avoid a contract. If is doubtful only in

1 Ld Ray 357
Co. J. 187

Duress

Wms. 202 case of the imprisonment of a parent, a child or some very near relation. If it is a stranger who is restrained of his liberty, there is no question, but that it is not duress.

Duress for minors may be in

9 Vin. 318 cases of fear of loss of life, of loss of limb or

2 Bro. C. 160, 2 member, mayhem or imprisonment. But

1 Blac. Com. 133 the threats must be against himself. There

Dar. El. 66 are however cases which sanction the doctrine that fear of imprisonment may be duress on the son, vice versa. In Equity relief will be granted against contracts obtained by any tortious constraint upon the will

2 Ven. 397. of the party, tho it does not amount to legal duress.

Respect to a father to induce him to make an equitable settlement of

1 Ves. 29 his estate, is not a ground on which a Court of Chancery will grant relief against such settlement

2 Vs 152

1. Atk. 291.

A security on a contract obtained by improper constraint upon the will of the party, if made when the power does not exist, & with full information of the whole matter is an affirmance of the contract, it cannot be avoided. But injurious contracts, marriage brokage bonds & such as are in their nature immoral & tending to the injury of the public interest cannot be affirmed, being from their very nature void ab initio.

Contracts void on the ground of illegality

A contract the performance of which is against morality or against the law of the State is not obligatory. Contracts immoral in their tendency are equally void with those immoral in their nature. In an excellent case on this subject in Collins vs Blantern in 2 Wils. 341 the whole law relative to the subject is stated & the opinion of the Court given by the Chief Judge in a most masterly manner.

2 Wils. 341

A contract to induce one to commence and prosecute a lawsuit is void, as it tends evidently to encourage litigation. So is a contract which stipulates to do a wrong, or neglect a duty. Bonds given to indemnify one against the performance of such acts are void. Injurious to the public good, the law of the State, against morality & the peace of individuals are not obligatory, but void.

Feb. 12

Hob. 12
Co. Cas. 353
1 Lev. 200

A contract assuming the discharge of a legal office is void. Bond for the neglect of duty

Doug. 670
Cowp. 790

There is no remedy against illegal contracts executed. This however is understood of contracts where the parties are in pari delicto. In cases where one party is in greater fault than the other, this rule does not hold. If is said however, if money is paid on a contract to do an illegal act, & the act is not performed, that money may be recovered back. Otherwise if the act has been performed

Cowp. 1785

Contracts which may injure the liberty of third persons are also void.

Usury

At com. law it was a crime to take interest for the use of money. By a Stat of Henry 8 it was made lawful to take interest not exceeding ten per cent. Other subsequent Stats have established different legal interest is now & has been for some time at five per cent. By a Stat of Geo. the legal interest is established here at 6 per cent a year

See Stat 6 Geo. 20

The exaction of more than legal interest in the loan of money makes ~~the~~ by our Stat. a bond, contract, obligation or assurance for the payment of money thus loaned utterly void. And by the same statute to take more than six per cent per annum is made a crime which subjects the receiver to the forfeiture of the double of the money or goods for the loan of which the illegal interest was taken.

Co. Litt. 20 Hob. 151

It has been mentioned at what time the interest of money ought to be paid. The first authorities on this point, considering it due at the end of the year, held on actual payment. Especially, upon the ground that such payment is an actual giving of more than 6 per cent. This notion is now exploded, & the payment of 6 per cent at the beginning or at any other time in the year does not make usury.

Co. Lit. 511

Mistake more than legal interest in a bond upon a bond, it does not render it usurious; nor does the actual receipt of more, incur the penalty of 3 l. & it has been held, mistake of more or exaction of more than legal interest on a bond, fraud may be admitted.

C. Eliz. 741
Co. Jam. 209
2 Ch. Ca. 372
Co. Jam. 253

But the rate of interest established in law is applicable only to loans where there is no other hazard of the principle, than the hand there may be in the mediation which the loan is made. When there is other & greater hazard the law imposes no ~~[illegible]~~ constraint on the demands of the lender. Hence exorbitant the interest may be if there is a real & not a colorable hazard of the principle, it is not usurious.

A bona fide contract is not vitiated by a subsequent usurious contract for forbearance upon the bona fide contract.

C. Dougl. 225

The offence of usury is not constituted, so as to subject the offender to the penalty of the statute by the indorsement of a premium not exceeding legal interest, tho for money loaned on a bond in which legal interest is reserved. But whenever the sum paid, over & above a premium or interest, exceeds lawful interest the penalty is incurred.

5 Vin. 250

more than legal interest received on a bond, in nature of a penalty, & at the mercy of the obligee whether he will accept it, or not upon a tender —

~~[illegible]~~ 5 Ch. Ca. 78
5. Ch. 69

The taking of money for forbearance is usury, tho it is in fact taking so much more than legal interest, or not usurious —

An usurious contract or pledge of the money, & the borrower breaches the property of one who is not privy to the usurious contract, & the obligee without giving information of the usury, encourages his receipt of the obligation

A security given upon a good & lawful contract, will, that the good contract at means is not a security in law, tho by being given with it, or at same time, it may be thought that a security is not upon the good contract is received, & it carries in the same situation as which it was given to at merely

2 Roll. Abr. 777

Contracts - Usury

[illegible] is more [illegible] given as a [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] cannot be enforced. So a bill of exchange to an illegal consideration in the hands of a bona fide [illegible] & in the hands a [illegible] [illegible] as to [illegible] them [illegible]

It has been a question whether a [illegible] may [illegible] a [illegible] [illegible] a [illegible] [illegible] [illegible] Under the [illegible] [illegible] [illegible] the [illegible] by a third person formerly [illegible] on the [illegible] that the [illegible] might be [illegible] of the [illegible] discharged the [illegible] arising on the [illegible] [illegible] [illegible] [illegible] [illegible] that the [illegible] [illegible] [illegible] [illegible] [illegible] on the [illegible] [illegible] [illegible] [illegible] the judgment may be given [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] agst him.

A contract [illegible] in one country [illegible] [illegible] [illegible] [illegible] which [illegible] legal, [illegible] in another country where the legal interest is lower, [illegible] will be enforced.

Hu. ii Ch. 148
2 Vern. 395
2 Ch. 202. 205
10 Ch. 296
20 Mod. 88

Ch. Ch. Vern. gives an opinion that an obligation reserving the interest at the place mentioned in contract, on which the obligation was given is made & on which payment will be made is not usurious; the real interest should be greater than the legal interest in the place where the obligation itself was made & executed.

Qu. to know the reason of the point &c.

Chancellor in 25. Geo. 2 based jurisdiction of contract usury is still taken against the as unconscionable & oppressive instead of its not being at the place where it is done by the Chancellor.

As cases of difficulty to prove the usury, there is an advantage in using a deviation to Chancery; because then the court allows the party to make a discovery of the facts. But if the Court of Law in that have the same authority, there would be Chancery in Law instead to the Law Courts.

Bark 129

But the Vern. supposes that the contract contrary under to usury & takes the law taken more than legal interest or that is law taken more than legal interest, because this would be subjecting him to the penalty of the 12 months is allowed to usury together

Contracts - Issuing

If a party is placed for a wrong the law
[illegible]. It seems that no man to
can be bound by the act of his agent
working out of the century; for the law
will not suffer a man to be bound
for the same offence.

Upon action on a bond exp.
may arrest be pleaded specially, but bon
action of a transitive a plea may be given
in evidence under the gen. issue, and
the whole contract. That in the declaration
so that it appears on the face of the
declaration, that it is illegal the action
may be demurred to.

Upon a plea it should also be
to state the rule of interest allowed to be
on the contract. Where a plea, however,
one gave reason why it should be void
then establishes, since it is indefinite
that the rule state be made out in
evidence. That the money is for lawful
raising down of horses is a misjoinder
[illegible]; for that it is an exception against
between the contracting parties, must
be pleaded.

Ass. 100.

Ass. 100. exp.

[illegible] when it is agreed by the parties, that compound interest shall be taken, is not usurious; but the part of the contract, which relates to the taking of compound interest is void; & no more than simple interest can be recovered. Nor is it usurious, nor shall the money lent back, on the contract avoided, if a lender at simple interest, the settle during the usual course mentioned, on the annual interest, agrees to pay & actually pays compound interest; or makes a settlement with his creditor & gives a new obligation including the compound interest. This question has been contended for.

The rule of computing interest has occasioned some difficulty. It has been established to be the rational & the most that no payment shall go to the reduction of the principal which does not cover the interest due at the time of such payment; & this rule to the extent of such excess. Notably the same rule has been adopted by the Cts in Connecticut & Mass & some other of the States.

of Contracts or else not be from
[illegible] of [illegible]

Men will that we will not re-
veal his hand or [illegible] of right
to the gen interest of society. This contract
that we will not reveal the fact in any
particular place, if made on a valuable
consideration is obligatory. The impli-
cation is not express on the face of the
[illegible] the presumption is that there
was no consideration. But this being
contrary to the gen rule, will suffer
the consideration of such bonds to be
examined, & the presumption to be
rebutted by parol testimony.

1 Com. 590
1 Ver. 142
1 Ch. Ca. 181
2 Ch. Ca. 196

A bond given on a [illegible] consideration,
or an illegal consideration, or any other con-
sideration is no more obligatory in the
hands of an assignee, than in the hands
of his assignor.

10 Mod. 196
1 Com. 498

It is a point settled, that where a bond is to be delivered & when the debt is to be received, the rule is, that if the bond is in nature of a deposit, it should be given to the parties, the debt literally should be received back, if the bond is in nature of a security it is otherwise. It is not always easy to distinguish, where a bond is the one & not in the other of these situations.

Contracts the performance of which is impossible are void. Thus one cannot contract that a thing is in the power of the other to perform & ought to fulfill he binds, the undertaking or contract notwithstanding the non, peculiar circumstances under a performance in his power impossible. If at the time of making the contract, it is manifestly possible & afterwards becomes impossible by the act of God, or the act of a third person, the party attempt to perform it becomes unnecessary, the contract ceases to be obligatory. But an impossibility

5 Bac. Ab. 117

which is the consequence of a mere mistake does not absolve him from his contract. The notorious standing the impracticability of performance, should exist in the case never that it be a necessary one, & require the disappointment to the penalties which the bond decrees for a non performance.

It is said that a condition which is impossible to be performed annexed to a bond is void, & that the bond remains as the bond had been no condition. This is a clear proposition, & not to be called in question because the condition of such bond is no other than the agreement between the parties; & could, if it should happen to be said by reason of its impossibility, that the circumstance of the contract being annexed to a writing, & in the form of a bond rather than in the form of a covenant cannot affect its validity.

A contract accompanied with conditions to be void on the performance of a certain act, is not invalidated by the conditions becoming impossible.

Contracts not to be valid unless reduced to writing

By an act of Parliament passed in the 29th year of the reign of Charles the second, certain sorts of contracts unless such contracts are reduced to writing:

1 — A special promise by an executor or administrator to answer damages out of his own estate

2 — A promise by any one to answer for the debt, default or miscarriage of another

3 — Any agreement or contract in consideration of marriage

4 — A contract or sale of lands, tenements or hereditaments, or any interest in them

5 — All agreements not to be performed within the space of one year from the time of making

Contracts not obligatory unless reduced to writing

It appears to be the opinion of the Court, that no agreement, being subject by the 17th section of the act mentioned before, to contract other than that which is actually made or intended to make a contract therein, which depends on other evidence than that of parol testimony is not included in being within the St.

Sed vide. 2 Bro. P. C. 561 — 3 Bro. P. C. 561

An advantage accruing, in the case to the party advantaged, by the act, does not give such a construction to the act as will add one unnecessarily in defrauding another.

Sell. 2 Bro. 182

If to a bill brought on such consideration to hold the debtor, a defendant of an insurance of a ship on some of his ships, it is made, that the insurance will come in aid of the credit of the creditor on a certain bankr. & that the insurance is no. no. tho' on account specifically for the

5 Mich. 303
2 Bos. 880
2 Bos. 3.

promise, or other, are not within the Statute of Frauds. A promise of marriage made by one to another, the promise expressed to be made upon any credit given to the promisee to the person who takes the benefit of the transaction.

Promise in consideration of marriage are distinct from promises to pay which latter are not within the Act.

Contracts relating to the conveyance of real property are treated in the same manner in the Act of Lars as they are in the Statute of Uses, the same following with forfeiture of the latter.

If the party sued upon the contract in Court, the question will be 1 Blackf. 50
Ind. Cir. 208.
3 Cranch. 3.
whether the contract of the defendant is such as could have been legally made in writing, the law will presume that the contract is good in writing.

[illegible] 1 Vern. 255 [illegible] 3 Atk. [illegible] would have the same effect as if written.

6 Ves. Jr. 561 A contract recorded is not [illegible] 2 Atk. 239 unless the [illegible] contracts partly executed [illegible] under the St.

Also a contract [illegible] 8 Ves. 1791 [illegible] unless the St.; or if written, if [illegible] been [illegible] with the [illegible] sales of the [illegible], that the [illegible] [illegible] to the customer [illegible] in his book, with the [illegible] [illegible] the [illegible] [illegible] book sales are not within the St.

Contracts [illegible] on a contingency which may happen within a year are not within the St. [illegible] 6 Ves. 1278 [illegible] 4 Ch. 280 not required to writing.

1 Ves. 6
1 Atk. 165
2 Vern. 175. 222
1 Vern. 201
2 Vern. 562
2 P. Wm. 161
Mod. 9.

It seems that the promise of a husband is not part of the settlement to his own hand writing is a sufficient signing. If one is a letter of a person with his daughter if another will marry her & the marriage takes place, it is such a contract as will bind the father of the daughter, tho there be no other auth. than a letter from the implied one from the marriage – See in margin –

6 Ves. 2. 56
1 Mag. 120

It is to what a writing will have the contract ever is of the St. the writing that the terms of the contract must appear from the writing. It is a general rule that the right of property can be acquired from no other than the person who has such right. It has also been an exception; as where by officious by an stranger of the

Contracts not obligatory unless reduced to writing

It is a rule of the civil law, that if the title, and in equity, the title must be preferred.

Sale of property which appears by the contract itself not to be either actually or intentionally in the seller is a void sale. But a covenant to sell that which belongs not to the covenanter is obligatory.

A leap by fraud is as a leap of no credit; but if one enter under such leap, the leap is a forfeiture, no action of trespass can be maintained for the entry

Due care ought in pleadings that all writings must be pleaded according to their legal effect, and not according to their purport

Of Implied Conditions Precedent

There are two sorts of conditions, — those which are actually performed to have been made upon the premises, the [illegible] of which, however, is by implication; — such as are found in a deed required by law — no contract being supposed to have been actually made.

2 Ves. 5.
2 Mod. 517
2 Ord. 67

If in a deed or bond with a condition is considered as a covenant, a specific performance of the condition of the bond will be decreed.

2 Dan. 480

If there be a litigated bond, either a bond given previous to marriage by the intended husband, to his intended wife, to leave her a specific sum if she survive him, is such an obligation as is good at Law. In Equity it is not binding against the defendant's heir or other of the heir-at-law.

Contracts express & implyed

2 Ver. 371 — If one of several contributors in Eq. be forced to pay the whole debt, he may maintain a bill in Eq. against the others to compel them to refund a contribution their equitable share.

2 Ch. Ca. 213 — Or one may be forced at law to have a contribution.

2 Ch. Ca. 138 — A mere right of action in Eq. cannot be assigned, no such thing being known in the Eq. laws. But the assignment is a covenant between the assignor & assignee that the latter shall have the benefit of the thing assigned. For if the assignor detains obligation assigned he is answerable to the assignee.

2 Ch. Ca. 138

2 Ver. 90

Of Consid. & c. [illegible]

It is said that a consideration is necessary for the validity of every contract and that the adequacy of the consideration is immaterial.

There is in truth no difference between a written & parol agreement as to the necessity of a consideration to give it validity. A bond is a covenant under hand & seal acknowledging no consideration, or acknowledging a consideration which is illegal or neither a good nor a valuable one is not obligatory. Whether no consideration is acknowledged parol testimony may be admitted to prove a consideration. An obligation, however, under seal, or without [illegible] acknowledging a consideration, [illegible] the [illegible] as [illegible] be [illegible] on the [illegible] though [illegible] consideration [illegible] the [illegible] of the [illegible] [illegible] a [illegible] no consideration can be proved [illegible] of [illegible] [illegible].

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Co. Litt. 47 a. 3 Lev. 343

[illegible] which is concurrent with an existing promise for another matter or of a debt of a stranger that is not liable to the same debt or duty, any new consideration for the promise the promise is obligatory.

Co. Litt. 47 a. 3 Lev. 343 Bell 27

[illegible] consideration on which to ground a promise. But the forbearance must be such as is merely nominal, or else for some specified time or else a reasonable time or present forbearance.

[illegible] 138

[illegible] forbearance can be regarded [illegible] of time, [illegible] consideration is for a promise which will be obligatory.

[illegible]

Collins [illegible]

[illegible]

Co. Litt. 207 Co. Litt. 207

[illegible]

Collins [illegible]

[illegible] promise for a consideration which is past, according to the ordinary rule, gives no right of action. The utmost is confined to those cases where [illegible] there is a prior [illegible] [illegible] 60
equivalent only to do that which being done, constitutes such consideration [illegible] promise done, such promise is obligatory. [illegible] 69
Thus the [illegible] that an inference [illegible], which is beneficial to the promisor, is sufficient to render a promise obligatory.

It has been a question whether the refusal of a promise to one person, the benefit of another, that third person is entitled to an action, the difficulty lies in the form only. By the authorities [illegible] it seems that the action must be brought in the name of the person to whom the promise is made. There are cases however, where the person entitled to the benefit of the promise sued for its performance. But these are cases of [illegible] agreements, [illegible] [illegible] between the promisor & [illegible] person for whose benefit the promise was made. [illegible] 30 2 [illegible] 3 B. 332

[illegible] 1 Brooke 177 — 2 Ves. 112

[illegible] contracts, obligatory on both parties, [illegible] the other. So [illegible] mutual promises, have each a right in consideration of the other promise, [illegible] dismissed by either but a performance by either: for in equity [illegible] to bind a thing [illegible] time in consideration that the other promise to be performed at specified time.

[illegible] 58 — [illegible] the time of the contract it appears that first promise, on one part is intended to be performed before the other, and the party who should first perform is incumbent upon him to no action till he has performed.

A mutuality contract by which provisions made for that he shall be obliged to perform it are [illegible] 20 Ves. 174 — 2 Ves. 17 — [illegible] general rule respecting mutuality contracts. [illegible] mutuality contracts are obligatory, & [illegible] specific performance.

Jan 30 [illegible]

[illegible] of the [illegible] to be [illegible] the [illegible] Damages. But

2 Burr. 998 [illegible] to [illegible] that [illegible] a [illegible] recommence, [illegible] a penalty equal to the value of the [illegible] at the time of the [illegible].

An executory contract [illegible] mutual by an agreement [illegible] to be [illegible] prevent [illegible] time of [illegible] execution. But the right [illegible] has accrued on the contract to one of the [illegible] an agreement that the contract [illegible] does not release the right of action which has previously accrued, for it is without consideration.

The conduct of the parties to a contract may be such as to [illegible] its efficacy.

2 Bos. & Pul. 116 [illegible] Pitt. 2 [illegible] Ross. 301 378

This is effected by [illegible] of the parties as shows that they have mutually abandoned their agreement. A right of action may be excluded by such acts as shew an intention to waive the right, as receiving rent accrued [illegible] the penalty after forfeiture of the [illegible] amounts to a waiver of the penalty.

[illegible] insist upon [illegible] sale [illegible]
liberty to abrogate, is still [illegible] a sale,
if the party refuses to abrogate, [illegible]
remedy is by an action of damages [illegible]
no use for. But it is [illegible] sale [illegible]
such a sale is revocable [illegible] by an
Dunn v. Sears one has liberty to abrogate.

If one party to a contract
hinders by his own act the performance of
his own benefit, the law presumes an
election against the other party to non perform
[illegible] by making himself incapable
of his own contract he gives the other
party a license to break it on the same ground.
In one case, the court said all the length
of saying, that one who hinders the performance
on the part of the other, shall take
no advantage of the non performance to
excuse himself from any responsibility
which [illegible] from an actual
performance. But [illegible] may work down
the authority of this case, [illegible] suppose that
the party who is prevented on his part from
completing all the terms of the contract
is entitled to the same [illegible] on actual
performance [illegible] with the term to [illegible]
is [illegible] so [illegible] only in which it is material
to have him from [illegible].

[illegible]

[illegible]

Co Litt. 31 b

[illegible]

[illegible]

Co Litt. 35 b

Contracts - Consideration

[illegible]

[illegible] 2 Vern. 240

2 Vern. 299

[illegible]

[illegible]

Vent. 57

Ath. 50

[illegible]

[illegible]

[illegible]

[illegible]

1 Ch. Rep. 67 [illegible]
3 Ch. 382. [illegible]

Powers of Cts of Chancery

[illegible]

1 Contracts of [illegible] marriage [illegible] Chancery will [illegible] a specific performance

2 Chancery will decree a specific performance of a [illegible] agreement to which one or both [illegible] from [illegible] he is liable.

3 [illegible] ; [illegible] Trusts [illegible]

4 A transfer of funded Stock.

5 Transfer to Devisee of [illegible] which is not [illegible] of a debt or duty that is discharged – [illegible] Devisee [illegible] the same [illegible]

6 [illegible] which is refused [illegible].

7 [illegible] promises [illegible] to [illegible] [illegible] agreement is [illegible] to the Bill, but comes in [illegible] to it –

8 [illegible] at law, brings a Bill in Chancery, alleging [illegible] on the merits [illegible] at law; the [illegible] being [illegible] at law, & by bringing [illegible] bill [illegible] Chancery.

9 [illegible] which is the object of a suit to obtain cannot be had at law [illegible] interpose — 1 Atk. 385.

It is a general rule, that a contract which is insufficient to support an action at law will entitle one to no recovery in Equity. 1 Ves. 256 2 Freeman 246

But this Mr. B. supposes that all those cases in which the insufficiency is in the formal Words in the substantial part of the contract are exceptions. Nov. 243.

If it happens by any means that there can be only a partial performance of a contract, they will decree a partial performance, such performance being prayed for by the party for whose advantage it is. *

An estate to one for life & to the heirs of his body is an estate tail; & to him for life & his heirs forever is an estate in fee. But in marriage settlements an estate to the husband for life & to the heirs of his body, is no more than an estate for life.

* Chancery will decree a specific performance, or payment of a sum of money in those cases only, in which the other party may apply to that Ct for a specific performance.

10 Wms. 468
2 Ven. 280
1 Bro. P. Cas 156
2 P. Wm. 220

that which is contracted to be done is considered by Ch J as done. If articles are entered into to convey land or other real property, such property such property is considered as already vested in the purchaser. & if injury happen before conveyance is actually made, the loss falls upon the purchaser. And if the purchaser dies the property goes to his heirs & not to the Ex^r. But the contrary if the who articles to sell dies, for the Ex^r & not the heir is entitled to the money arising from the sale. Likewise when one has entered into an obligation to lay out money in land for the benefit of another, if the money is not so laid out, it shall descend in the same manner to the heirs as the land would have done had the money been actually vested.

It has been questioned whether Chancery ought to decree the specific performance of a covenant with a penalty for non performance. The rule observed by the Ct. in this particular is, that if it appears to have been the intent of the parties, that the penalty should operate merely to enforce & secure the actual performance of the covenant, a specific performance will be decreed: Otherwise, if it appears that the parties intended the penalty

as damages for breach of the covenant, & that it should be optional with obligor to perform the contract or incur the penalty &c.

Bargains & hazards which are equal at the time of making them, Chy will enforce, any subsequent inequality notwithstanding.

2 Bro. P. Ca. 415

Any fraud or unfairness in contracts is sufficient to prevent Chy from interfering to enforce them. But tho there is degree of fraud & unfairness in a contract, still, if it is not a defendant taxing some on him on whom the imposition is practised, Chy will not relieve it.

2 Atk. 383

1 Ven. 227

1 Ves. 170

Chy will not make a decree which is nugatory & useless; & therefore will not decree that money, devised to be laid out for the purchase of land for the benefit of an heir, shall be so laid out; but upon a bill brought by the heir for that purpose, the money will be ordered to be paid to him. If the land to be purchased is to be holden by the heir in fee tail, it will be decreed that the money shall be so invested according to the tenor of the devise.

Rules of Cts of Ch.y

Thang 7 58
9 Mod. 132
2 Ves 671
Cas. Ch.y 175
10 Mod. 515

Ch.y courts refuse to decree to compel a merely voluntary conveyance. If it is a limited ancestor who contracts to convey for the child he it is on a good consideration & perfect agreement will be decreed.

10 Mod 515

Chy. will decree the execution of a trust, tho no action can be maintained at law for a breach of it.

Of Actions which arise on Contracts.

Esp. N. P. 1

Assumpsits are of two kinds, express & implied, as Indebitatus Assumpsit & Quasi Assumpsit.

Where there is an indebtedness in a sum certain, not by specialty. Indebitatus assumpsit is commonly with express assumpsit & with debt. To support an indebitatus assumpsit it is sufficient that the sum can be made to a certainty.

Cro. 92. Slades Case

When there is a liability to pay a sum of money, which liability is grounded on no contract; Indebitatus assumpsit will lie altho express assumpsit or Debt will not. In these cases, it is generally commonly with some other action, as trover or trespass, where the thing has been found or taken & sold. But for stolen money it is said that this action will not lie. The law of our country Wd. seem, supposes it otherwise.

2 Burr. 1008

Indebitatus assumpsit only, lies for money paid by mistake, & in a variety of other cases.

1 Term. 285. 112
Salk. 28

2 Burr. 1008. &c
4. Co. Rep. 92

Ld. Mansfd. It is much more plausible to say "That where Debt lies an action on the case ought not to be brought" the point made in Slades case & such other settled & constant followed is "That an Action of Assumpsit will lie in many cases where Debt lies, & in many where it does not lie.

Contracts. Action on Assumpsit.

This action is concurrent with several other actions in several other cases: As for money fraudulently obtained, if the fraud be total: 2 Bur. 1005 for money paid on a contract which the other party refuses to fulfil: 1 Stang. 407 for money paid on account of another: for money lent; for money paid on a contract the consideration of which fails: 1 Term. 732 Shaw vs. Wood for money paid in satisfaction of an unjust or unconscionable demand: for money obtained by unfair or tortious means. It lies to recover money back 2 Stang. 916 paid to one acting under a void authority 1 Term. 62 Esp. N. P. 3. Salk. 27 case in Salk. 27 contra. When authority is granted by a court having competent jurisdiction the person acting under such authority shall not be adjudged acting under a void authority, even if he may be compelled to act. 3 Term. 125

Indebitatus Assumpsit lies for the avails of goods taken & sold upon an execution on a judgement, which were after such taking and sale. Trespass does not lie in this case, nor can the articles sold in this manner be recovered out of the vendee. Indebitatus assumpsit also lies to recover forfeitures by the bye laws of corporations 2 Lev. 252

5 Burr. 2639
2 Black. 1078
Doug 23
Cowp. 414
5 Burr. 2590

This action lies against a bailee for money received on the sale of an article to which he had no title. But if there has been a delivery of the thing sold, it does not lie, unless in case of a delivery. Nor does this action lie for money received on the sale of real property by one who has no title.

Cowp. 37
5 Burr. 2803

By the com law of Eng money won on a fair wager may be legally recovered. Indebitatus Assumpsit is the proper action in such case.

Cowp. 566
5 Burr. 2639

Indebitatus Assumpsit does not lie against an agent for money paid him by mistake, if it has been paid over to the principal. Otherwise if the money is not paid over to the principal.

Contracts relating on Assumpsit

In general it is not necessary to make a demand or give notice of a debt or duty; but there are exceptions to this rule. If it is out of the power of the promisor to discharge himself by a tender, a special demand is necessary. Such are all promises to do business for another, which the other must first furnish to be done; and such are cases of rent bills to be paid by merchants in articles from their stores.

If from the form of the contract, the time or place of the contracts performance, may be supposed within the knowledge of the obligee, & not known or not conveniently known to the obligor, it is necessary that notice be given.

If the debtor has not the means of knowledge as respects the sum which is due, information of the sum must be given.

In case where performance is a necessary document, the manner of the performance must be stated in the declaration.

Co Jam 206 — In actions on express assumpsits it is requisite to state the case & manner of indebtedness. An action of assumpsit against A. for money lent to B. at the request of A. will not lie; the term lent being technical & implying that the indebtedness was in B. & not in A.

2 Wils. 141

Salk 23

Salk. 140 — In assumpsit the breach assigned must follow the undertaking; otherwise it is bad.

1 Vent. 61.

1. Strang. 21 — In an indebitatus assumpsit the day stated in the declaration is not material, except in those cases where this action is concurrent with express assumpsit, and when the day is a material circumstance. In an assumpsit upon an informal contract the day is material.

2. Strang. 806

Salk 223

2 Ld Ray. 533

Com Rep. 450 — An agreement which was good at com law, now by St required to be in writing, need not be stated to be in writing; but if St has created a new right of action, which did not exist at com law, & required that it be in writing, it must be declared to be in writing.

2 Burr. 735 Whatever is alledged in a declaration in an express assumpsit must be proved, that it was unnecessary to make the allegation does not make it the less essential to

Co Eliz. 149 prove it when made. It is also necessary in this action, to state the promise & the consideration of the promise, & these must both be proved as stated. If there are two

Co. Eliz. 79. consideration both must be stated.

Where divers considerations are

Co El. 149 alledged, some frivolous & void & some good the Pltff shall recover. If the Pltff in a assumpsit fails of proving an express agreement, he may go into evidence an gen-

Doug. 628 eral covenants.

Of the several defences to the Action of Assumsit.

Of the plea of Tender.

Tender is a good plea in all cases in which the demand or damages are capable of being rendered certain by any determinable rule; as in an Indebitatus Assumpsit on a quantum valebat the market price may be tendered. So in trespass if the damages are certain, being fixed by law or assessed by the jury.

If tender is made & the tenderee refused brings the money into Court he is entitled to his cost. It has been a question who after the tender, owns the money tendered.

It is clearly established that if a note is given for any thing except money & tender discharges the note, & renders it incapable of being received; & that the property tendered is absolutely vested in the tenderee. Nor is the tenderee in this case under any obligation to keep as bailee the property tendered.

Assumpsit Defences &c.

But when the note is given for money it is contended by some that the tender does not discharge it; & that the note still subsistingly efficacious to enable the holder to recover the money by suit; & allowing capable of being rendered as operative as it originally was by a subsequent refusal on the part of the tenderer to deliver the money on demand: whereas if the note were extinguished, it would have no efficacy, nor could it be revived by matter ex post facto. But Mr R supposes that the note for money is in fact discharged, & the property of the money vested in the tenderee; but that the tenderer is by law constituted bailee of the money, & that he is not permitted to avail himself of his tender in a defence unless he will deliver the money.

It is objected to Mr R's doctrine that the suit is always brot on the note; whereas if the property vested by the tender in the tenderee some other action would seem more proper. To this it is answered that the reason for bringing the action on the note is that the law will not suffer the creditor to recover the money without bringing such action as he may will lodge the note in Ct, lest at a future time it might be brot forward against the tenderer.

got in exchange other articles than money ~~offered~~ are tendered & refused, the tenderer may, if the articles are afterwards kept & not delivered on demand, sue for them in trover, instead of bringing his action on the note. The reason for this diversity in the two cases appears to be this: The tender of money is obliged to keep it till it is demanded by the tenderee; & as the tenderee is then made liable to be called on, he ought to be made answerable in the manner which is most for his benefit. But in the tender of any collateral thing, as cattle, &c is under no obligation to keep the article tendered, the law does no thus him such indulgence; for he is not liable to be called upon at all except by his own folly in keeping articles, as bailee, which he is not required to keep. And if he will make himself liable the tenderee is not obliged to sue him on his note.

With regard to the principal question whether a note is discharged by a tender of money there are no Eng. adjudications directly in point. There are, however,

Assumpsit — Defences to —

two cases in one of which it was determined that the note should bear no interest after the tender; & in the other that loss by depreciation in the value of the money should fall on the tendrer —

The S.C. & S.J.C. have determined that that the property of the money rests in the tendrer by the tender. So long as the tendrer does his duty as bailee tender is as effectual as payment & the obligation is dead.

In some few cases tender is a good plea where the damages sought are uncertain: as is the case in an involuntary trespass, tender of sufficient amends before action brot is a sufficient & good discharge. What are sufficient amends must be determined by a jury. It is supposed that in those cases in which tender is a good plea to an action of trespass, it is by St & not by com Law.

2 Lev. 209 In all cases where a tender may be made a tender is a good defence. If the debt due is a sum certain, tender may be made at any time, even after the commencement of the suit, costs likewise being tendered. But if the sum is not certain, nor capable of being reduced to a certainty a tender cannot be pleaded.

If the time & place of payment are fixed a tender must be made at the time & place fixed for payment. If payment is to be made at a certain place on or before a day mentioned, or on a certain day or within a given time after; the party is not obliged to attend at the place to receive the payment on till the last day & the utmost convenient time of that day. A tender, therefore at

Co. Lit. 73. 14

3 Lev. 104 any other time than the utmost convenient time of the day mentioned would be ill; unless the parties met at the place

Strang 777

before this time & a tender was made in a high

5 Rep. 114

case it would be good. If the place is fixed

3 Rep. 92

& the time is not the obligor must give notice to the obligee of the time when he will make payment; & if a tender is made at that time it is good.

Articles which are contracted to be paid at a certain time, cannot be tendered after that time; but a demand may be made of their value in money.

Moor. 87

1 Vent. 211

No such peculiar an assignee being known to the com Law of Eng, it has been a question whether a tender to an assignee can be be pleaded in bar of an action. It is now settled law, that such plea is good. But it is not necessary at law that the tender should be made to the assignee. It may be made to the obligee notwithstanding the assignment. In Equity it is otherwise, & a tender must be made to the assignee.

It is said that a bond expressly conditioned to be paid to a stranger is not discharged by a tender to such stranger. This, Mr. Serjt, cannot be supported on principle. There is, however, no question but that a tender to a stranger for the use of the obligee is good

1 Lit. 207

2 Rol. 523

L. Ray. 254

The penalty of a bond for a greater sum conditioned for the payment of a less sum at a day, is saved by a tender of the less sum at the day. It is to be remark. that, as a gen rule, a tender goes no further than to save the penalty & bar a recovery of damages, it does not discharge the debt. But in all cases of obligations relating to real property, & conditioned for the payment of a sum certain at a particular day a lawful tender on the day discharges the obligation &

Co. Lit. 209

tender no remedy to recover the money tendered & refused: unless the obligation is founded on some prior debt or duty, & not gratuitous.
2ly — If, on the same principle, any remedy would remain after a refusal of a lawful tender, in case of a pledge to secure the payment of a sum of money, that sum being a gratuity.

The operation of a tender in case of a Ob. Recognizance or bond with a defeasance of Assumpsit made for the payment of a less sum, is in Mr. R.'s opinion, inexplicable —

9 Rep. 79.

The refusal of a lawful tender prevents no duty or obligation from attaching upon the tendorer, which would attach by a receipt of the tender; nor does it deprive the tenderer of any right which would accrue by a receipt of the tender.

Salk. 75. 523
Ld Ray. 962

In pleading a tender it is necessary to show at what hour of the day it was made, that the Ct may judge whether it was the last convenient hour of the day

Salk 624
2 Vent. 109

Assumpsit

Accord & Satisfaction good Defence

9 Rep. 79
8 Rep. 44
Co. Jm. 605
Ro. Abr. 46
Ro. Jm. 100. 254

Accord & satisfaction is also a good defence to an action on an assumpsit. The rule is, that accord & satisfaction is a good plea in all cases where damages are demanded. It is an ill plea in bar of an action for debt or duty, which is by deed, if it answer by deed; but if the duty be the deed & arising out of it, accord & satisfaction is a good plea.

2 Wils. 86
Roll 128
4 Mod. 88
1 Hung 126
1 Roll. 128
2. Bl. 198
Co. Lit. 212.

Accord without satisfaction has no effect. It is not sufficient that there is a satisfaction, but it must be a satisfaction adequate to the just demand of the party. It is not necessary that the satisfaction be proved to be equivalent; it is sufficient that the contrary does not appear. No satisfaction which is not of a pecuniary nature is a good satisfaction; for the reason just mentioned, that it is not an equivalent satisfaction, no payment of a less sum being allowed to be pleaded as a satisfaction of a greater.

2 Salk. 125
1 Mod. 88
4 Rep. 79
1 Roll. 129
Cro. Eliz. 193
1 Mod. 64.

Accord must be certain & must be executed. The doctrine that an accord is of no validity until executed is objectionable, & stands opposed to principle.

1 Strange 573

Formerly the mode of pleading accord was by way of accord; in which case it was necessary to plead the precise execution of the whole agreement; but the modern and most sensible mode is to plead it as a satisfaction, i.e., that such a thing was given & received as a satisfaction.

4 Rep. 80

Of Awards

An award is a good defence to an assumpsit. The law with regard to awards, when they are a bar to an action, & when they are not is different from what the Law formerly was.

The power vested in Arbitrators is similar to the power of a Court of Chancery. They what is right between the parties. An award differs from a Decree in chancery in this, that the former gives the title to the thing, whether it be money or any other thing that is claimed; & the thing awarded may be recovered in an action at law suited to the nature of the claim; as Debt for money, Trover for an horse or other articles; but a decree in Chy does not vest the property of the article.

An Award is final & nothing can go back of it. The Arbitrament extends the original right, & tho there is a refusal to abide by the award by one of the parties, he can have no action on the matter submitted.

A submission may be by act of the parties either with or without the intervention of a Ct of law: Submission by rule of Ct originated in the reign of Wm. & the practice is in affirmance of the St of Wm relative to relative to submission by rule of Ct. In C. there is a similar St. By the Eng. St refusal to abide by the award, if the submission is by a rule of Court is a contempt, & the party is for it imprisoned till he comply. In C caution is granted upon the award. But caution can be granted only in case money be awarded, & therefore any other thing is awarded a refusal must be treated as a contempt of Ct & the party be imprisoned to compel a performance.

In C the agreement to submit must be in the presence of the Ct or it must be sent into Court written & subscribed by the parties. After an award is made it must be returned into Ct, when either party has an opportunity to remonstrate against it on ethgrs; & if the Court find it so they will set it aside.

Awards

1 Ld Ray. 122-147
6 Mod. 35
2 Ld Ray. 961-964
co 45
1 Salk. 76

The case in which the law is now varied from what it was formerly, are, where there is a bare agreement to submit; or an agreement to submit with a mutual promise to abide the award; or an agreement with a promise on consideration to abide the award. In either of the two first cases an award of any collateral thing other than money was by the old law of no validity, & therefore could be pleaded in bar of an action unless executed; but money awarded could be recovered. And now the law is the same in all other instances as it is where money is awarded.

Other mode of agreement are by writing the agreement to submit, stating the controversy, & each of the parties binding himself in a penalty to abide the award; or by each of the parties executing to the other a note for such sum as is agreed, & delivering those notes into the hands of the arbitrators as an escrow to be disposed of as they shall think fit: or by a covenant to submit the controversy & abide the result.

2 Atk. 585 It is a usage among Merchants, joining in company, to insert in the articles of partnership, a proviso, that if any difference arise it shall be submitted to arbitration. This proviso is so far obligatory as to make it necessary that an offer be made to arbitrate before any suit can be sustained. Covenants to submit to arbitration controversies, which may arise subsequent to the covenant, would be of no validity except among merchants.

2 Bro. Ch. 336

Before an award either party may
8. Rep. 80. revoke a submission. If the submission is by parol, it is revocable by parol; if by writing, the Eng law is, that it can be revoked by writing only.
8 Rep. 82. Whether writing is necessary in C. to revoke a submission by writing Mr. Revis doubts.

A revocation of a submission is a forfeiture
8 Rep. 32, of the bond, or a breach of covenant to keep abide & observe the award. Mr. Revis is at a loss whether a bond of this kind is chargeable in Eng. In C. such bonds are chargeable; and the rule of damages is the trouble & cost which the obligor has occasioned the obligee.

Hullis

By the eng law a revocation of a parol submission entitles one to no recovery of damages. This is supposed to be law only in cases where there was no consideration. This rule probably originated when awards by parol submission were of no validity & was founded in the reason that there was no loss by the revocation, there was no means by which the award could be enforced.

~~Salk. 73~~

If one revoke a submission & return before any inconvenience arise in consequence of the revocation, the revoking is not a forfeiture of the bond. It is a question whether a submission by a rule of Ct can be revoked; if it can, a revocation would be a contempt & an attachment would issue in the same manner as for a non performance.

Salk. 73

+ Who may be a party to an Arbitrement

Every one capable of contracting may be a party to a submission. A husband may submit those controversies of his wife & her property, which it is his right to interfere in settling. But a feme covert, joining with her husband in an arbitrement, is not bound by an arbitrement. There is, indeed, one decision in the year Books contradicting this doctrine. If this is law it is an exception to the gen rule, to which the coverture by fine & recovery are the only other exceptions, that a feme covert cannot bind herself by her contracts.

Louch. 207

A submission by an infant, is, like all the rest of his contracts voidable or void. It has been questioned whether one, who submits in behalf of an infant & binds himself, that the infant shall perform the award is liable, if the infant does not perform. Anciently it was holden that, the person submitting for the infant, was not liable on the award. The law is now otherwise.

1 Lev. 17

Comb. 318

arbitration, lest they be partly to

It has, however, been a question whether an Ex can submit to arbitration a controversy of his testator. The law formerly was that he could not; it now is, that he may; but if a less sum is awarded than can be recovered at law, he is

1 Saun. 691 answerable for the difference.

A submission by one copartner binds not another, but himself only. If all unite in the submission, & one only gives a bond, all are bound by the award; but if for no

2 Mod. 228 performance of the award the bond is void, he alone who gave the bond is liable.

If one by the order of another agree to submit his controversy to arbitration the prin-

12 Coke. 26 cipal is bound to perform the award. But an attorney making a submission by no other authority, than that he transacts business for the principal, is liable on the award, if the principal will not abide by it. Attorneys transacting business in Cts of justice are exempted from this rule.

It was formerly the law, that

Cro. Eliz. 10 debt lay not for an executor on award, &

457 - 606 for the reason that he could not wage his law,

2 Vent. 249 as his testator might have done, if the action had been brought against him. The reason of the law

2 Ld Ray. 248 being removed, the law itself then ceased to continue. An Ex is now liable in debt on an award.

Of Matters submissible to Arbitration

All controversies may be subjects of arbitration excepting as follows:

1 — All criminal matters

Rob. 99. 48
Brooks. 66. 44
Rol. 66. 242
Rol. Ab. 2. 270
L'Hay. 115
6 Mod. 231

2 — Matrimonial matters relative to the legality of marriages, or concerning divorces.

3 — Matters relative to the qualities of persons, as their legitimacy or rank of a kind nothing as to be found in the Eng. laws, but only in the Code of Justinian.

4 — Eng. authorities relative to the submission of things of realty are various & contradictory. The reason of this appears to be that the law has not been uniform on this subject at different periods. The law now is settled, that all matters relative to real or well as personal property may be submitted to arbitration; but that a title to real property does not pass by an award. The remedy for non performance, is by an action on the bond.

In C. it has been in one instance adjudged that a submission with end of land in dispute; executed by each party to the other & delivered into hands of the arbitrators to be by them given up to the party to whom they should adjudge the property, with his title to the property. So that there is no objection

grounded on the Eng. maxim that the title must vest instanter, & cannot commence in futuro; because the title cannot vest upon the delivery of the deeds. In C. this maxim is not adhered to; or if it were the objection seems to be obviated by considering the arbitration as the agents of the parties, & their delivery of the deeds the delivery of the parties themselves. But it is still necessary to suppose this power vested in the arbitrators, irrevocable after the award; otherwise it is in the power of the parties to defeat the delivery by countermanding the authority of the arbitrators to make a delivery. Mr Reeves supposes that this authority is not countermandable after an award published —

5 — It is said that an award does not give an interest in a term for years, that that be a chattel interest. A decision Co. Lt. 223 is in contradiction to this —

Co. Lt. 223

6 Rep. 43
1 Lev. 92
Cro Jac. 99
Hob. 659. 628

C— A debt or duty arising & growing immediately out of the making of the deed is not discharged by an award, if submitted by itself, & not in connection with other matters. But such a debt or duty submitted with other matters an award discharges. If the duty arose subsequent to the making the deed & not by the deed solely, but by the deed & some act after making the deed; an award may be pleaded in discharge of it.

Of such persons as may be Arbitrators

The grounds of disability for exercising the power of an arbitrator are want of discretion & of freedom to act according to the discretion which a person has. For the former reason idiots, lunatics & infants are excluded from being arbitrators. For the latter slaves and feme covert are excluded. By the civil law a person interested might not sit as arbitrator. By the Eng law he may provided his interestedness was known to both parties at the time of the submission. As Arbitrators are judges of the parties own choosing, no objection to their character will be admitted to defeat the award.

1 Wod 226
Ward. 48

An umpire is one appointed to make an award, provided the arbitrators cannot agree to make an award, neglect, refuse, or die before an award is made. He is appointed by the parties, or arbitrators or the parties over agree. In making this appointment arbitrators must act with fairness & discretion

2 Dern. 485

Whether if arbitrators renounce their authority, an umpire may make an award previous to the expiration of the time limited to the arbitrators to make their award has been much litigated. It was formerly

1 Wod 275
2 Dern. 100
Sid. 428-464

Wed. May 6. Feb. 1. 1. 1

Of the power of Arbitrators.

Arbitrators being by the parties appointed, fix the time & place of their sitting & summon the parties to appear. They have power to examine witnesses & even the parties themselves. Arbitrators may adjourn. They cannot decide on a part & submit a part to an umpire, the submission to the umpire must be in toto.

Barrys No. 57

If the submission is general to the persons named, the arbitrators must be unanimous & an award of the majority is bad. It may however be agreed by the parties to submit to the award of such persons or a majority of them; in which case the award of a majority is good. But the award of a majority, one being absent & not notified of the sitting of the arbitrators, has the appearance of fraud & collusion & would be bad. If a party had notice & a part neglected, or were prevented from attending, an award of a majority would be good

Dyer 213
1 Rep. 103
6 Mod. 160

An award in a submission that the award be delivered to the parties by a day, or lie ready by a day need not necessarily be in writing, for a parol award may lie ready or be delivered.

Cro. Jac. 315
Pal. 10. 146
Hav. 43

Arbitrators can confer no power to be exercised after the time for making the award has elapsed. Such a reservation operates to vitiate their award. But a ministerial act in obedience to the award, may be awarded to be done, after the arbitration time has elapsed, without affecting the validity of the award.

2 Atk 501
Strang. 1025

An arbitrator cannot delegate his authority to another, it being a special trust reposed in him. A ministerial act may be awarded to be done by another. Such acts go not to make an award, but are in pursuance of one already made

Cro Eliz. 676.

An award may be made at midnight of the last day of continuance of the arbitration authority; tho in C. the last day in which service may be made of a writ ends at the time at which so great darkness that the writ cannot be read by the light of the sun

Of Awards

An award should be of such things only as are in the submission, and an award of any matter which is not in the submission is void. But an award embracing a matter not submitted is not necessarily wholly void. If the part of the award not in the submission causes such part as the submission authorizes to be in no respect other than it would have been without the part not in the submission, the part only not submitted is void. If the part within the submission is varied by the other the whole award is destroyed.

2 Mod. 309

A submission of all suits means a submission of all suits commenced at the time of submission. All action & complaints includes all actions & causes of actions at that time existing.

It is a litigated point whether a collateral thing may be awarded as a mere compensation in damages. The law in this particular, is not settled.

6 Mod 221
2 Dr Ray 1039
1 Sid. 12

2 Ray 115 The term "demands" in a submission com=
=prehends all possible matters of difference
existing between the parties. It was
adjudged that a suit of one of the parties
in right of his wife, was not within a
submission of all suits." Mr. P. thinks that
a suit in right of a wife, for a thing which when
recovered would be the property of the husband
10 Mod. 204 ought to be included under such submission.

A new appendage of that which is sub=
=mitted is void, because not in the submission

All matters of controversy between part=
=ners being submitted, the arbitrators may
1 Black. 475 avoid a dissolution of the partnership.

It has been therefore contended that,
the authority of arbitrators does not extend
to the awarding costs. An award of costs is not
2 Burr. 645 within the power of arbitrators

A release of matters not in the sub=
2 Black. 818 =mission is void as to such matters, but good
2 Burr. 626 so far as it is of such things as are in the sub=
1 Ray 115 =mission. It is a general release, awarded on a
2 Mod. 169 general submission of all disputes, or of all
1 Show 172 disputes of a particular distinction or descri=
10 Mod. 201 =ption, comprehending a period of time
not within the submission, void as to that
time but valid as to the rest. Such release

AWARDS

was anciently held to be void in toto, or void,
2 L. Ray. 964 unless it could be shown that no right of ac=
=tion, which it imported to release, accrued in
the time included in the release not in the
submission.

An award of a thing to be done to a
5 Rep. 77 stranger was formerly void, unless the thing to
Cro. Jm. 639 be done to the stranger was really & apparently
3 Lond 62. for the benefit of the other party. It is now
presumed that an act awarded to be done to a
stranger is for the benefit of him in whose
L. Ray 123 favour the award is made; & to set aside
Salk 74 the award because the act is not to his advan=
=tage he must make it to appear. But an
10 Rep 131 award of a thing to be done by a stranger is
in every case absolutely void, excepting only
in influence, where it is in the power of the
party, in whose behalf the act of the str=
=anger is to be performed, to compel him
to perform.

It was anciently held that, if one gave a bond as agent for another, that he should abide an award, the principal alone was bound; it is now the law, that both are bound.

1 Wils. 28 - 58

It is a rule that the award must be as extensive as the submission. But in cases of a general submission of all controversies it is sufficient that the award is of all, which the parties lay before the arbitrators. Where there is a submission of a gen nature the presumption is, that the award is of all that is submitted, till the contrary be made to appear. And tho' other controversies which are not in the award, are shown to have existed, it will be presumed that they were not known to the arbitrators. Also several special & distinct matters are referred to the decision of arbitrators, an award may be given of one & not of another, or the rest. But if the submission is of all differences generally or particularly of several things mentioned, with a proviso, so that there be an award of the premises" the award must be of all matters, of which the arbitrators have notice, in one sense; & in the other, of all in the submission.

1 Bur. 274
2 Vent 242
Hob. 69
8 Rep. 98
2 Saund. 292
Q. Car. 383
Salk. 75

Ca. Jac. 200

An award of a thing which is unlawful to be done is void. So of a thing physically or morally impossible to be done, or that which the party hath not power to perform without the concurrence of another. Also an award of an unreasonable thing is void; as that one should give another a given sum of time

8 Mod 278
3 Lev. 153

It is questioned whether an award of damages, for that for which no damages could be recovered at law is a good award. The authorities are contradictory, but it appears reasonable that such award should be good.

1 Sid. 12.
2 Saut 245

An award to pay part of a debt was adjudged ill, as being unreasonable, probably because it was that no discharge of the whole debt, & consequently that there was a remaining liability, for the remainder. It would now be adjudged otherwise, & we should presume that the part awarded was in satisfaction of the whole, or rather that no more was due at the time of the award.

2 Mod. 364

If an idle thing be awarded it is nought.

Anciently much was said of mutuability in awards. This proceeded from a mistaken notion of mutuality. It is a sufficient mutuality that one party receives that, which is his due, & that the other is discharged from his liability.

2. Lund. 292
2. Eliz. 432
2. Jm 525. 314
Keans. 1024
2. Ray. 1076

Certainty is another requisite of an award. Absolute certainty is not required; but the award must be so certain & definite that two different things cannot be equally within the terms & meaning of the award.

An award of a sum of money, not mentioning to be upon the submission was formerly held ill. It is now otherwise, it being presumed to have been awarded on consideration of all the matters contained in the submission.

2. Mod. 232
1. Salk. 76
Thurg. 903

An award must be final as to that which is submitted. And tho' an award is void as to part, & the void part is a consideration of the other part, or execution of the void part, give a right to require an execution of the whole.

Awards

It has been contended, that an award in the alternative is void for uncertainty: Mr Reeves supposes that such an award is not void.

Ac. Gen. 193. 95
Palm. 107
1 Lev. 3.

Want of mutuality cannot be objected to an award by a party who has received, or has power to recover all which it was the intention of the arbitrators he should recover.

Palm. 109. 112. 121

An award may be by parol in all cases, unless it is the agreement of the parties, that it shall be otherwise. In this particular, as in all others, the agreement must be strictly regarded in all things which may be in any degree material.

It is a general rule that an award must be literally performed. To this rule there are a few exceptions, for which see the cases in the margin.

3 Burr. 67
6 Mod. 34
Stang. 903, 1082

Lord Coke's doctrine that an award of a sum of money, or of any other matter, upon a consideration which is void only in part, is a valid award is now exploded; tho formerly, there were several decisions in conformity to it.

10 Rep. 131

of Declaring & pleading on an Award.

To recover a sum of money awarded, either Debt or Assumpsit is the proper action. To recover when a specific thing is awarded to belong to the party, who has not the possession, the proper action is trover, or such other action as is a proper remedy, when one man has in possession the property of another. If some collateral thing be awarded to be done, as that a leaf be given; or if some collateral thing is awarded in lieu of damages, if an award of such a thing is to get an action on the express assumpsit is the proper remedy. When the submission is by parol, these are the only remedies, unless an action for damages can be sustained on the express or implied promise to abide the award.

2 Show. 61 — In declaring upon an award it is necessary to set forth the submission that it may appear that the award is, or is not in conformity to it. If the award is by parol, it is not necessary to set forth the whole award, but it is sufficient to aver that there was an award, & to say inter alia the matter on which the Pltff grounds his action, was awarded. In an assumpsit the Pltff may assign as many breaches as he pleases, but when an action is on a bond no more than one breach can be assigned. A breach assigned

Yelv. 85 — Junkins. 261

of a void part of an award is bad. If several breaches are assigned, some of a valid & some of a void part of an award, & entire damages are given, judgment will be arrested.

Stang 723 In debt on an award a mutual submission must be shown.

One mode of defence to a bond on submission is for the Deft to pray oyer of the condition of the bond, or confirmation of the bond, & the condition of pleading to be for the performance of an award; the Deft plends no award, under which plea, every matter which goes to show that there was no legal award, may be taken advantage of. To this the Pltff replies an award, setting it forth in totidem verbis & assigning a breach. If the Deft thinks the award illegal, he may demur; if the award set forth is a good one, no defence can be made, but a denial that such an award was made. If the award was not made till after the day set for the arbitrators to make an award, advantage may be taken of it by pleading no award before the day immediately upon oyer of the bond, to which the Pltff must reply an award before the day, setting it forth at large. If the submission require that an award be delivered to the parties by a day, no delivery before the day, may be pleaded & replied to in the same manner as no award before the day.

Ld. Raym. 156. 874 — It is requisite for the Pltff not only to set forth an award, but the time, by whom, & the whole manner of making the award must be shewn, that every particular of the submission may appear to have been complied with. If the submission requires a totally immaterial & idle thing, it need not be noticed.

Co. Jam. 278
2 Mod. 77
2 Lev. 68

According to the ad authorities the Pltff must aver a performance on his part of all things awarded to be performed, excepting things to be performed subsequent to a performance by Deft. Modern decisions are that performance is not a necessary allegation, unless performance is made a condition precedent to performance on the part of Deft; or unless that which the Pltff was awarded to do is void; in which cases, if the thing to be performed by the Pltff makes any part of the condition for which the Deft is awarded to do, on his part, the Pltff must allege performance.

Hard. 43.

It is not required that profert be made of an award made in writing; but if a profert is made over may be prayed of it. Upon over of the award it may be demurred to for illegality. If no profert is made no award must be pleaded by Deft & to this the Pltff must join in issue.

Yelv. 24-158
2 Mod. 309
2 Ray. 1114

If the ground of defence in the action on bond for the non performance of an award, is no submission; non est factum must be pleaded to the bond. (the cases in margin)

2 Vent. 221
3 Lev. 293

An award being to pay at or before a certain; & for breach assigned thereon, that it was not paid on the day, was held an ill assignment; tho, in pleading payment, before a day if payment is made, it is payment at the day.

Cro. Jam. 610

An award being that a sum be paid on request, it is necessary, that special request be made, & if such request is not made & stated in the declaration it is bad.

The breach assigned of an award to pay a sum on delivery of the award, was that the party did not pay on delivery. It was contended that the breach was not well assigned, because to pay on the delivery of the award means within a reasonable time after: But the Ct held it well,

giving the same construction to the word "on delivery" in the plea, that is given to them in the award. If the award is in the alternative, in assigning a breach, it must be alleged that neither has been done. The rule, that no more than one breach can be assigned in an action on a bond, Wilkes thinks somewhat relaxed; tho there are no decisions to establish it.

2 Wilf. 267
293

In all cases where a Deft resorts to a defence, other than that there is no award or no award on the premises, it is unnecessary to set forth an award.

Gilb. 25-99
Cro. Jac. 300

In Debt upon a bond, after praying oyer of the condition performance may be pleaded. If upon a gen. submission of all matters, the arbitrators award only a part of such as they had notice of, it vitiates the award & the Deft should plead no award on the premises. To this the Pltff must apply, set forth an award & assign a breach. If the Deft suppose the award illegal, he may set it forth himself & aver that there is no other award.

Cro. Jac. 200

2 Eliz. 338

Awards – Declaring & Pleading of

It seems to be the better opinion that it is sufficient to plead performance, without pleading particularly the manner of performance; but it should be pleaded in the words of the award. Tender & refusal may be pleaded to an award. After a general performance pleaded it is left to plead a special performance. If one party ac=cepts & then to an action on the bond pleads "no award" the Pltff may reply a revocation.

Cro. Jac. 339

L. Ray 254

8 Rep. 81.

If submission is by bond & the parties agree afterwards that the arbitrators shall make no award till a day posterior to the day mentioned in the bond; no action can be sustained on the bond for non performance of the award made after that day fixed in the bond had elapsed.

3 Burr. 592

It is a gen rule that Ch of Eq will not interfere to enforce the performance of awards, but will leave the party to his remedy at law. There are cases, however, in which Chancery will decree a specific performance of collateral matter awarded.

Hard. 54
2 Ver. 317
1 Atk 62

If the submission is by a rule of the Ct of Ch^y that Ct will have a specific performance, tho' the parties have long acquiesced in an award Ch^y will aid to enforce a performance. An agreement or promise to perform is another ground for Ch^y to interfere: A specific performance of an award will be decreed, if there has been a performance or a partial performance by one party.

2 Vern 24
3 P. Wm. 187
Finch 22

Ch^y will not compel a Party to disclose a breach; but will restrict him to the penalty of the bond.

2 Ver 215
3 Atk 529
2 Ven. 5th
3 P. Wm. 352
2 Wms. 148

In cases of a voluntary submission which is by rule of the Ct, a bill may be filed in Ch^y to set aside the award, for any possession, partiality, confusion or corruption in the arbitrators. In these cases the party is without remedy at law.

2 Ven. 705
3 Atk 495

If it appears upon the face of an award, that the arbitrators went upon a mistake in point of fact, Ch^y will set aside the award. So if they mistake a clear point of law, the award will be set aside.

Awards Declaring & Pleading of

2 Vern. 251

If an arbitrator has an interest to make a award in favour of one of the parties more than the other; or if the party is his debtor & an award in his favour will enable him to obtain payment of his debt which he will otherwise lose it is a ground on which they will vacate an award

1 Atk. 77.

They will set aside an award, if one of the parties conceal from the arbitrator an important fact which the arbitrator will swear in Court would have influenced him to have awarded otherwise, had it been disclosed to him before the award made

Of the effect of an award to bar other actions

An award does not bar the original right of action, when the title of land is in controversy, but non-performance of the award is a forfeiture of the bond to perform the award. The case is, by the Eng. law, the same as an award of a debt or duty which arises by bond. If the debt or duty grows immediately out of the bond, & not by something subsequent to the making the bond. The laws of C. differ from the law of Eng. in this particular.

3. Bul. 68 — An award performed, or an award the performance of which can be compelled is a good bar in all cases of personal actions. A Defamation which appears to be an idle
1 L. Ray. 2. 1. 8. 122 — mere quarrel before, has been made a bar the
Salk. 69 — award imposes a new duty, instead of that which was in controversy, & when the award goes to extinguish the old duty by awarding a release of the old duty.

Several persons commit a tort, & there be a submission of the matter by the injured party, and one of the persons guilty
Com. 328 — of the tort, an award may be pleaded in bar of an action agst the other.

Awards - Effects of to bar an action

In case of a submission & before an award made, a suit is commenced; the submission may be pleaded in abatement.

Ch J will relieve agst the corruption & partiality of arbitrators, notwithstanding the submission is made a rule of Ct of law; if a Ct of law cannot give relief.

Illegality in the contract is another ground of defence to an assumpsit.

Of Illegality of Contract as a defence to an assumpsit.

This is a good defence. If the contract is correctly set forth in the declaration, the illegality must appear on the face of the declaration, & this may be demurred to. If the contract is partly stated or partially stated, & the illegal part omitted, the evidence cannot support the declaration & the verdict must be for the Deft. The same must be the fate of an action on a covenant. If the contract be in the form of a bond with a condition, it may be, & the age of the condition, demurred to, for illegality.

An illegal contract may in all cases be avoided, but not always in a Ct of law. Such contracts as are malum prohibitum, & such as are malum in se are void at law; but such contracts as are illegal, merely because they militate agst the good of society, are, in some cases, void at law, & in some void. Marriage brokage bonds, & contracts which tend to the breach of peace are void in Eq. only. XX

Fraud — Defence to an Assumpsit

Fraud is a defence which may be made to contracts. Fraud in the execution of a contract destroys its validity at law; but fraud in the consideration makes it void in Eq only. At law the contract is good & the remedy for the fraud is an action of damages. Dr C. If the fraud is total, the contract is void at law. Especially contracts & contracts which are a fraud upon third persons are good at law but they will relieve agst them. See title fraud. X

Infancy — Infancy is a person contracting renders the contract void, as to certain persons. (See ante)

Drunkenness — does not generally affect the validity of contracts. To this rule there are some exceptions. (See ante)

The contracts of infants & some coverts do not bind them except in certain cases, & under certain qualifications, for which see title Infancy. Barons & Feme.

Mistake is a ground for relief in Chancery.

Duress is a good defence at law; & may be given in evidence under gen. issue in an assumpsit; but to a bond or other specialty it must be specially pleaded. If the duress does not amount to legal duress, relief can be had in Eq only. (See ante)

Fraud. Defence to Assumpsit.

These several grounds of defence are more fully considered, under different heads in different parts of the Lectures. They are here simply mentioned as being good grounds of defence to an assumpsit.

Statutes of Limitations

No advantage can be taken of the St. of Lim. unless it is pleaded: this St is not to be considered as actually extinguishing the contract, but as a power in the hands of the Deft. which he may avail himself to bar the demand against him; & the presumption of law is, that he claims not the privilege of the St till that presumption is rebutted by an actual pleading it. There is still another reason why advantage cannot be taken of the St. of limitations on a demurrer, to wit, that it does not appear in the declaration that the contract declared upon is not within some proviso of the St, or that there is not some matter which takes it out of the St.

It has been question, litigated both in the Cts of G. & the national Cts & various decisions made upon it in these Cts, whether an action can be sustained on a bond, barred by the St of limitations, by virtue of a promise to pay, made after the St had run against the bond. It has been held that the promise is a good foundation, & an action on the promise has been sustained. In support of the doctrine, that the bond is not barred, but that the action may be sustained upon it; it is urged that the St has a meaning upon the presumption arising

from the length of time; that the debt has been discharged; & therefore that an acknowledgement of the debt, or any act, or any act a fortiori rebuts this presumption, by proving the debt unpaid, takes the case out of the Statute. The case, of one who acknowledged the debt, & affirmed that he would not pay it, because barred by the St.; and all the cases which have been adjudged taken out of the St. be a clause in a will, that the testator willed all his debts to be paid, are contradictory to the idea of a presumed payment.

Agst. supporting an action on a bar it is insisted, that the original contract is barred & entirely expunged by the St., so that no action can be sustained upon it; but that the new promise gives a new ground of action & upon that the action must be maintained; the old contract being a consideration for the new promise. To reconcile the adjudications of the Ct. to this opinion, it is said that, if there is an acknowledgement of the debt, or any act which proves the indebtedness, the law raises the promise as in other cases of indebitatus assp. There is one

decision, however, which very clearly appears not to rest on the ground of any new promise, express or implied in law. We therefore apprehend, that the principle which governs cases of this sort is, that if the debtor at any time does an act which shews his intention to pay the debt, tho' it is barred by the St. yet such act is a waiver of the St. of limitation, & being once waived no advantage can afterwards be taken of it.

Dut. N.P. 148

Earth. 470

5 Mod. 425

Doug. 629

There is a com law principle, that length of time with corroborating circumstances, & even length of time alone, is such evidence of payment, as shall bar a demand. A period of time less than that fixed by the St. of lim. with other corroborating circumstances, has been adjudged sufficient evidence of payment to defeat any claim. But length of time is merely presumptive evidence, & is liable to be rebutted by any matter which affords evidence of the existence of the debt. Twenty years is the period, after which at com law, the debt is presumed to have been paid, if nothing to the contrary appears.

Cols. p. 109

5 Burr. 172

1 Bur. 434

Strange 826
Bokay 1570
3 Bro. Parl. Ca. 536

It has been contended, that an endorsement on a bond or note, tho not in the handwriting of the obligor is evidence to rebut the presumption of payment arising from length of time. As an endorsement may be made at any time by the obligee, it appears in truth of itself totally without credit.

By St 21 of Jac. I Chap. 16. Sect. 6. is enacted that if a Plff, in certain actions by that St barred, unless brought within the time therein limited, obtains judgment, and that judgment be afterwards reversed, or if the Plff in other cases therein mentioned, fail of recovery, he may bring another action at any within a year after the reversal of said judgment &c. This St. Mr. Reeves supposes to have been declaratory of com law on this subject, & therefore the law of C. is, if the suit is commenced before it is barred by the St. & a judgment is obtained & afterwards reversed, he may bring a new suit within a reasonable time.

1 Ven. 79
1 Atk 282

By the decisions under this St. it appears, that a suit commenced & not voluntarily withdrawn prevents the attaching of the St upon the demand, until a year has elapsed after the failure of the suit. In like manner an Ex. or Adm. may bring an action, not barred at the death of the testator or intestate, at any time within a year from the decease of the testator or intestate.

Statutes of Limitations

If the right of action accrued at the time of making the promise, non assumpsit infra sex annos is the proper mode of pleading the St; but if the right of action accrued subsequent to the promise, the plea should be, causa actionis non accrevit &c By a St. of C. the St runs from the time when the promise was made.

2. Salk 422

Infant 422 &c is barred to admittance upon which the St of limi has begun to run, if it begun to run while they were in that situation, it still continues to run — the infancy, absence &c of the claimant notwithstanding.

1 Wilf. 134

It is questioned whether the St limiting the time of bringing all actions of trespass &c to one year operates to bar an action of trover when that action is concurrent with trespass. The Supr Court have now decided, that the St does not bar trover. This

Mr. R. thinks opposed to the intent of the St.; which he apprehends is to bar a recovery upon such cause of action, & not merely to bar the right of recovery in that form. Slander for special damages sustained, where the words themselves are not actionable, is not barred by the Statute.

That the promise is merged in a contract of a higher nature is a good defence to a promise. It is a settled principle of law, that the parol contract is merged in the deed; but it has been questioned whether this is to be considered, as a performance of the parol contract, & so plead. Mr. Bacon supposes the facts in this case ought to be pleaded.

Non est of insolvency, may be set up on a defence in an action for false imprisonment. An arrest of one who has obtained such a court, is not false imprisonment, unless the terms of the act have been complied with, & a certificate obtained discharging him. In this case the Pltff & not the officer would be liable.

Alienage of an enemy is a good plea.

Strang. 1082 It seems that it should be pleaded in abatement, & on it goes not to the merits of the cause, not in bar. If it is pleaded in bar it is conclusive, & totally precludes a recovery at any future time, when the Plaff may cease to be an enemy. There are cases, in which alienage of an enemy has been allowed to be pleaded in bar, but these are old cases of such enemies as could not become friends: Ex Mahometans, Jews &c as we formerly used to be.

A Bankt in assumpsit may plead a release. A parol release, unless it be a mere rescinding of the contract, is of no validity. In E. it must be pleaded specially —

Strang. 422

Of Debt

Geo. Car. 487

Debt is concurrent with Indebitatus Assumpsit in all cases of a promise to pay a sum certain. For a sum of money, due by bond, Debt is the only action proper. Debt is also concurrent with covenant on a covenant to pay a specific sum. This action lies generally in all instances of liability in a sum certain, when there is a possibility of a covenant between the parties; but in all cases where all possibility of a contract is excluded, Debt will not lies, tho the sum to be recovered is certain: as for money found, or for money obtained by fraud. The penalty of a St is to be recovered in an action of debt. Debt lies upon a judgement.

The usual mode of suing on a bond is to bring the action for the penalty of the bond; leaving it for the Deft to disclose the condition. But if the Plff states the condition in the declaration he must assign a breach.

A judgment may be said, Mr R. supposes, when the same advantage cannot be had by taking out execution as by suing the judgment.

Of Debt

Dio. Cas. 539

In a suit upon judgment no advantage can be taken of any thing previous to the judgement. Any fraud or imposition in obtaining the judgement, which goes to set it aside, or rather to shew it no judgement, may be taken advantage of. If however, the judgement was obtained in a foreign Ct it is no more than prima facie evidence of the debt, & the Deft may shew any matter to make it appear, that such judgement ought not to have been rendered.

Doug. 1.

Debt lies for rent reserved on a lease.

3 Rep. 22

If the lessor assign his interest, the lessee may have debt agst him or agst the assignee, at his election. But if the lessee come in consideration of the assignee, the lessee is forever discharged from all rent, which may arise subsequent to the assignment. Vide all the law on this subject in 3 C Rep. 22.

Salk 81

Strang 1221

A bond to a woman to pay her a sum of money upon condition that she live with him in a state of fornication, or in consideration of past illicit commerce had with her is void. From this excepts the case to pay a woman for an illicit commerce had with her; she having, previous to her connection with him, sustained a fair character.

3 Bur. 1568

2 Wils. 339

2 P Wm. 432

Of Debt.

Co. Lit. 292. 222
Wms. 65.
10 Rep. 128
1 Wils. 80

No recovery can be had on a bond, without a penalty, to pay a sum of money at several different times, until the time of the last payment. A bond with a penalty conditioned for the payment of a sum of money by instalments, entitles to an action for the penalty if the obligor fail to pay any of the instalments when they fall due; the whole penalty being incurred for a non performance of any part of the ~~award or~~ condition.

3 Burr. 287.
Ro. Eliz. 232
3 Bur. 1380
1 Wils. 59

The penalty of a bond can be recovered by such persons only, as the obligor binds himself to. It has been contended that an Executor not be sued on an obligation where his testator was not liable to be sued. It appears settled that this is not law. In a bond to in the disjunctive, the penalty is forfeited upon the happening of one of the contingencies.

of Debt

In debt for a lease at will, the Plaff must show occupancy; & for how long a period; on a lease for years, it is unnecessary to show occupancy, the lessee being in this case, liable on the grounds of contract, whether he occupied or not.

Salk 209

The Eng decisions generally on that a deed, which is intended as an escrow, must be delivered to a third person. If delivered to the party himself it becomes absolute & is no escrow. Mr R suppose that there is a distinction between a delivery to become not the act & deed of the party upon a condition; & a delivery, which is not to become the act & deed of the party, until the happening of a contingent or until a certain condition is performed. This distinction was taken in Co Eliz 885 & adjudged a good distinction. In the former case the delivery becomes immediately the act & deed of the deliverer, & is not undoed void by the non performance of a condition, annexed to it; in the latter case, the delivery never becomes the act & deed of party, till performance of the condition.

C. Eliz. 520
Root 37

Parol testimony is admissible to show, that a deed is not the property of one in whose name it was made.

1 Dunn. 622

A razure in any part of the deed by the obligee himself is fatal to its validity. A razure in any immaterial part by a stranger without the knowledge of the obligee is not fatal.

Solvit ad diem is a good defence to a suit on a bond. Previous to the St. of Ann, payment after day could not be plead in bar; since that St. this has been accounted a good plea. The bond being to pay on or before a day, the plea of payment should correspond with the fact, as to the time when the payment was made. By a usage in C. payment at any time previous to bringing the action is good plea.

Shang 994

2 Bur. 944

When there are several debts due from one to another, & a payment is made of a part; the payee may say upon which debt the payment shall be applied. If the payee does not elect the payer may. In this Ct of Chy. are said to differ from Ct of Law;

6 Eliz. 68

Shang 494

1 Dun. 24-34

of Proof

as the former allows not the buyer to discharge one debt by election rather than another, but says, if it is more for the interest of the debtor to discharge one debt rather than another, it shall be applied to that debt which will be most advantageous to the payor. MR. supposes that some rule is in fact observed in Ots of law; & that the receiver is allowed to elect, in cases only where it is immaterial to the interest of the payor, how the payment is applied.

If any advantage is intended to be taken of a legislative act to avoid a bond, the act must be pleaded specially.

Hargh 493-498.

Of Indemnifying Bonds

It is questioned whether liability alone is sufficient ground of action upon a bond of indemnification. It is a well settled point that the least special damage, entitles the surety to recover to the extent of his liability. If, therefore, special damages are the only grounds of recovery on the bond, much more is often recovered than the damage sustained. It appears, indeed, that when the damages recovered exceed the damages sustained, the excess is on the ground of liability; and if a recovery can be had partly on the ground of liability, again, it may not be wholly on the same ground. Mr. R. thinks that there is a distinction, between bonds of indemnity against obligations to be paid at a certain day, & obligations to pay on a demand. A neglect to pay at the day, he supposes, a breach of the indemnifying bond, & of course that it may be immediately sued; tho no special damage is sustained; in the latter case, there is no breach of the bond of indemnity, & no action can be maintained upon it till special damages are sustained.

6 C Rep 24
1 Jones 329
2 Bulst. 105-94
Cro. Eliz. 264
330
1 Rol. 452
Cro. Car. 349
Cro. Car. 288-340
Dyer 187
1 Strang. 681
2 Vent 261

If one is liable for the debt of another, by protection or act of the other, it is admitted that the liability alone is sufficient to entitle him to a recovery of damages to the extent of that for which he is liable.

C. Eliz. 53.

It has been decided by the Supr. Ct. of Errors in C. that liability alone is sufficient to entitle one to a recovery on a bond of indemnity. This decision has been ever since considered as settling the law on this point. The same doctrine is recognized in the Eng. Cts. in several decisions. Post 291 contra

3 Bulstr. 234.

A release of all demands extends to all actions & causes of actions, & to debts not due till a future day; but not to a covenant not broken, nor to a guaranty.

Co. Lit. 292

Salk. 578

A covenant not to sue operates as a release & may be pleaded in bar. If a covenantee to a covenant, of which they would decree a specific performance, has obtained possession of that, which he ought by the covenant to have, Ld Mansfield said he would not suffer the covenantor to sustain an action at law to take it from him; but would allow the covenant to be shown to bar the claim. Yet the covenant not to sue discharges the right of action. It seems that a covenant not to sue for a specific term, does not bar the right of action within that term, and that the only remedy of the party is by an action of covenant. A covenant not to sue one of several joint & several obligors was adjudged no discharge of the others, tho it discharged him. But when one of two joint debtors was released from prison, it was held that the other was also released; quere if any difference in these cases

2 Salk. 573

Co Litt. 292. 623.

1 Show. 86.

Bonds - Indemnifying

Strang. 503
Co. Lit. 283
C. Eliz. 494
C. Eliz 202

If there are several joint obligors, & one only is sued, the omission to sue the rest must be taken advantage of under a plea of abatement. But the one agst whom the suit is brot must show, that there are others who are joint obligors with himself. And if there are several joint obligors, & all do not join in the action it is a proper matter to be taken advantage of under a plea of abatement.

Doug. 205 - 89

To prove a bond the subscribing witness must be produced, & no others can be admitted for that purpose; even the confession of the obligor is hardly sufficient. But if the subscribing witnesses cannot be found, proof of their hand writing is sufficient & admissible;

Strang. 878.

& if the witness has become infamous his hand writing to the bond must be proved.

Hob 35
C Eliz. 213
Strang 500

A covenant to save harmless or for quiet enjoyment agst all persons generally extends not to tortious acts, but to the lawful acts only. But a covenant to save harmless in a particular matter, or from the acts of a particular person, extends to tortious as well as to rightful acts.

2 Bur. 2225 In a covenant with a penalty an action may be brot for the penalty, or for damage upon the covenant. In the former case it appears to have been the intent of the parties, that the penalty should operate to enforce the performance of the covenant; & not an alternative, which he may elect to forfeit or perform the covenant; the penalty may be chancered. But if it appears to have been the intent of the parties, that the covenantor might elect to perform the covenant, or forfeit the penalty, the whole penalty will be recovered. In case the action is brot on the covenant for damages, the penalty is

2 Bur. 2228 no rule of damages, & more or less than the penalty may be recovered.

5 Rep. 16 If a lessee covenant, not naming his assigns, to do any act to improve, repair, or remove any part of what is leased, or do any thing upon the leased premises, the assignee are bound to perform the covenants of the lessee. If the covenant is to erect a new thing, or to bestow labor in any way upon a thing which is not in esse, upon the thing which is leased, the assigne not being named is not bound to perform. If the lessee covenants for himself his heirs

& assigns, the assignee would be bound in the above cases. But the lessee cannot in any case, bind the assignee to pay the labor off of the leased estate; & a covenant which
1 Blac. 351 is broken previous to the assignment, has
Salk 199 in no instance any operation on the assignee.

It has been already observed, that the assignee of a term is liable for rent & to
Doug. 441 the lessor, & it seems not to be necessary, that the assignee should enter & enjoy to subject himself.

It has also been said, that an assignment does not discharge the lessee from his liability to his lessor for rent; but that
Ceo. Jac. 309 after acceptance of rent by the lessor from assignee, he is discharged. Acceptance of rent by the lessor from the assignee does not discharge him from his covenant.

An assignee of a term may plead
Show. 340 in defence to Debt agst him for rent, that
Doug. 755 he assigned before the rent became due.
Salk, 81, And if a lessee of a personal thing covenants
5 Co. Rep. 17. for himself & his assigns, the covenant is not binding on his assignees, but only on his Ex.r & Adm.r.

As the assignee of the lessee is bound by the covenants of the lease, so is the assignee of the lessor bound by his covenants with the lessee. And the obligation of the lessors covenants of real property with the lessee descends upon the heir. If, however, a breach of the covenant had happened, prior to the lessors death, the executor & not the heir is liable. The heir has the benefit of all unbroken covenants in the deed; but if the covenants have been broken in the lifetime of the lessor, the benefit of them belongs to the executor.

In an action upon a covenant in a lease it is necessary to state, ~~[illegible]~~ that the lessor had a right to lease & also to state a lease made & such an one as is legal. The lessee may plead, that the lessor had no interest in the tenement, & in this case it is incumbent on the lessee to show a title in himself. But if the lessee sue the lessor for a breach of covenant, in that he had no interest in the demised premises, it is sufficient that the lessee can show any title in him self, if the lessor does not show where it actually is.

y Ruf. 60

10. Jac. 1. 4. 370

Pleadings — Judgment by default

Co. Lit. 303

Co. Dig. 691

In an action on a covenant of the affirmative, which is of such a nature that no question can arise upon the validity of the performance, performance may be pleaded generally. But if a question of law may arise, relative to the performance's validity, the manner of the performance must be specially shewn by the pleadings. If the covenant is in the negative, it must be pleaded specially that the Deft hath kept his covenant

If the covenant is joint the action must be agst all the covenantors; if joint & several, agst one or all. Joint covenantors may plead several pleas; & if judgment goes agst one on default, or if a verdict is found agst him upon the plea; such judgment or verdict will be set aside, if ~~the~~ a verdict be found for the other obligor on his plea.

Of the action of Account.

By the Eng com law an action of account lay only in case of Guardian in Socage, bailiff or receiver, between the clients for the benefit of commerce. In Eng. & also in C. it is now extended to other cases.

The action of account is always grounded on some contract between the parties express or implied. The pltff sue for damages that the Deft do account, but no damages are recovered. If the Deft plead the gen issue, which is no bailiff or receiver, & verdict found agst him, judgment is given quoad computet. The same I suppose is the case when it is found agst the Deft on any plea in law or that he hath accounted, or a release, or upon default of the Deft to appear.

3 Wilts 75 Judgment quoad computet being rendered the Ct appoint three auditors to hear & examine the accounts of the parties; & they are vested with full power to appoint time & place to adjust the accounts of the parties before them to swear them &c

Account - Action of -

The Judges make one award according as they find the accounts of the parties, and this award, being returned into Ch. the Ch. render judgement thereon agst him agst whom the award is found.

An Infant may sue one who has meddled with his estate without law or right, in an action of account, considering him as his guardian. This is a solitary exception to the rule above mentioned, that an action of account always arises on a contract, either express or implied.

A contract notably is necessary in an action of account; but by the Eng. law, the sum in demand must be to the pltf. ascertain. The Ch. of C. have extended the rule to demand which have certainty for the sum, or as to the sum.

1 Rol. 116 If money is delivered to one for a particular purpose, he is liable in an action of account. If one receive the goods or chattels of another & covenants to implay them in a particular manner, or to account for them, or if he give his receipt for them, an action of account or an action on the covenant will lie agst him. Reg. In the action of account, lies by an Ex. agst an Ex. & by & agst an Ex. of an Ex. If there are several Exs, one if need be, may sue the other to account for a parte which he has received. One partner may sue another in account. Other action lies by an Ex. agst an Ex. de son tort.

Co. Lit. 89

The action of detinue has nearly gone out of use in Eng, & never gained a foothold in this State, little, therefore need be said relative to it. Like account, it is founded on contract, express or implied, & is for the recovery of a specific thing.

of Wrongs

Personal wrongs alone are now to be treated of; and the law & remedies, relative to personal wrongs will be considered together.

of Slander

Slander, in its legal sense is different from that which is commonly understood by the term. Injury to reputation is not in all cases, necessary to constitute slander; nor is every injury done to the reputation of another, legal slander.

Slander

4 Rep. 16
Hutt. 182
Mo. 142
2 Wils. 177
2 Burr. 675
Cro. Car. 229
3 Wils. 59.
2 Str. 752
Salk 694

Slander is of two kinds; words of themselves actionable, without any special damage sustained; & words which are actionable in consequence of some special damage sustained. Words in themselves actionable are

1 – words which import a crime to which corporal punishment is annexed, and words which are injurious to reputation & which imports that which subjects the person to a fine.

2 – words which tend directly to injure a man in his profession or calling –

3 – words which are against the official character of a man in office –

4 charging one with being afflicted with a disease which tends to exclude him from society –

That words may subject one to an action of slander, they must have been spoken maliciously & falsely; the Plaintiff must then allege. Malice is, however, presumed, if the words are falsely spoken; but such may be the circumstances of the occasion on which they are spoken as to remove the presumption of malice.

Slander

The legal sense of the term malice is very different from the sense in which the word is commonly understood. It comprehends, in a large sense, malice. In law, therefore, whatever is done with an evil intention is done maliciously.

It is said that no action can be maintained for words in heat & passion. This appears not to be a reasonable ground of excuse. Provocation is a palliation; but can rarely amount to a justification complete.

If words which are not actionable are stated in the Plaintiffs declaration, they may be proved to enhance damages for the words which are actionable. Mr. B. supposes that these words are to be proved to show the malice with the actionable words were spoken, rather than to enhance damages. To enhance damages is it is true, the effect of proving them.

The magnum scandalum of the Eng law, we have nothing of in C. There is to speak respectfully of the nobility.

An action will lie for words, which of their
must necessarily occasion special damages; or
Ro. Eliz. 289 for words, in consequence of which, there is
a high probability that damages will
accrue, previous to damages actually
sustained.

No action can be had for words
spoken in the course of legal proceedings
in a Court of Justice, if those words are perti-
nent to the subject in hand. But for an
Ill, set forth things unnecessary & foreign
to his cause, by which he slanders the
Party's character he is liable.

Wo cannot be proved in mitigation
of slander. No special damages can be
given in evidence which are not stated in
the Declaration; Nor the words are actionable
Ha. 206 alone no suit can be maintained for special
damages which may afterward accrue.

In Eng. circumstances to show
that the was no malice, may be given in
2. Strong. 1200 evidence under the gen issue not guilty
If the Defr. defence is to prove the truth
of the words, he must plead it specially.
The law of L. is different in this respect

Slander

Wm. Pt of Lim does not lie an action of
2 Lev. 2.8 slander for special damages. In arte
of words actionable & words not actiona-
ble are charged in the same, or different
counts, the Deft may plead not guilty
to the actionable words, & demur to the
rest, or not guilty to one part & demur
to the other. If this is not done & not gu-
ilty is pleaded to the whole, a general
verdict of guilty, without specifying what
part the Deft is guilty, may be arrested,
if there is any count in the declaration ma-
de up of words not actionable. But if the
actionable & not actionable words are in
the same count, a gen verdict is good.

Slander is by the Eng. laws, no crime,
but in C. it is made a crime by St.

Of Libels.

Libels are slander written, & are of two kinds — such as give the party slandered a right of action for damages — & such as do not. The rule of distinction between libels, which are actionable, & those which are not actionable is, in some books laid down to be the same that holds between words actionable & those not actionable. This, however, appears not to be the rule, & in several instances damages have been recovered for libels, which would not have been recovered if the words had been spoken.

All libels are criminal & subject to a punishment, upon the principle, that they tend to disturb the peace of society. It follows from the same principle that it is no defence that it is true.

Libels

One right of another publish a libel the publisher & author are both liable, but writing a libel if never published is not cullpable

Writings which affect the government are libellous & punishable. So are writings which tend to the corruption of morals.

Of Malicious Prosecution.

If one, knowing that he has no legal nor equitable demand, commences a suit against another, with intent to vex, it is a malicious suit; & gives the one sued a right of action for the vexation. It has been questioned whether one supposing himself to have a legal demand a right, but knowing his demand to be unrighteous, sues with intent to wrong the Defendant of a sum of money, is guilty of malicious prosecution. There appears to be no case where an action has been sustained on the ground of an unrighteous suit.

If one, having a just demand, sue in a vexatious manner, endeavouring to make unnecessary trouble & expense for the Defd. he is guilty of a malicious prosecution. If one sue in the name of another without her authority, & sues in a Court which he knows have no jurisdiction of the cause, he is liable on an action for a malicious prosecution. Living in another State, is said to be malicious, or not, according to the circumstances of the case.

Malicious Prosecution

1. 4. of Ann. that gives damages for a malicious prosecution, & inflicts a fine; but this fine is rarely or never exacted, unless it be moved of the ct by some person, that they inflict it; in which case it is inflicted on judgement for Pff.

No probable cause is necessary to support an action against one for a prosecution in a criminal case. If there was no probable cause malice will be implied, but malice alone is insufficient if there was probable cause, the officer, who acts for the public, is not liable, tho he prosecute without probable cause; but he who is the cause of the prosecution, or who aids & promotes it, is the blamable party.

The law once was, that no action could be maintained for a malicious prosecution, unless there had been an acquittal of the crime charged. It is now sufficient that the prosecution is at an end, whether by an acquittal or by quashing the indictment by the Court.

An acquittal is prima facie evidence of no probable cause, & casts the burden of showing that there was probable cause on the other party. In cases of no acquittal it is incumbent on the party complaining to show that the prosecution was without cause.

An acquittal can be proved in no other way than by a copy of the record of court.

If a charge be entire an indictment may be joint against several; & in an action for a malicious prosecution against several entire damages must be given.

Hob. 75. 910

3d. Injuries to the Person.

Injuries to the person are by threats, by assaults, by battery & by imprisonment. Threats, it is said, are no ground of action, unless they are such as would ~~affect~~ put in fear a man of common firmness, and occasion some inconvenience to the person threatened. As the principle on which any action in this case is maintained is the inconvenience caused, there seems to be no reason for restricting the action to such threats as would affect a man of common firmness.

2 Vent 256 An assault, which is an attempt to beat, is a good ground of action. An attempt, which is without possibility of effect, is not an assault, on which any action can be maintained.

2 Black. 272 Some injury is the immediate effect of an action, the remedy may be by an action of trespass vi et armis. But if the action be laminate before the injury happen, the injury not being by the action, but by its consequence, the effect on the case is the remedy. Trespass lies

1 Mod. 405
Salk.

in all cases of an injury done, where the intention was to do wrong act, tho the injury done be of a different nature & to a different person, from the injury & person intended. It also lies for an injury by an act, attended by any negligence, but if one, in the performance of their lawful business & taking common care injures another, trespass does not lie for the injury.

Comb.
But N.P. 16
Hob. 134

If two agree to do an act which being agreed they may lawfully do, & in doing it one injures another, the trespass will not lie; but if the action agreed to be done is an unlawful one, this said an action may be maintained, if an injury insues. This latter doctrine seems not to be according to principle.

Provocation is held not to justify an assault & battery. In a prosecution for the public for the offence, it goes to mitigate the punishment; & to mitigate damages in a private prosecution. But, of course principle it ought not to prevent any recovery at all in all cases where nominal damages only are given, because of the provocation.

The defence to this action is by denying the charge, in which case the plea is not guilty. In excusing the act the plea is not guilty & the matter in excuse given in evidence, or it may be pleaded specially; or by justifying in which case, by the Eng laws, the matter in justification must be so pleaded, but in Ct. may be given in evidence under the general issue.

1 Hawk 130 — Matters of justification are legal authority to arrest that it was done in self defence, in defence of an husband, wife, servant, child or property. An officer may justify an assault by pleading that he had a legal warrant to arrest, but to justify a battery he must plead self defence.

Stang 10.29

A battery to any degree is justifiable to any degree if made in self defence. A battery may be justified in defence of persons property in possession, & a. that property be attempted on the violence

8 Salk. 562 — 1st Day 1777 — Co. Jac.

It is laid down as a rule, that nothing may be stated in the declaration to enhance damages. The true rule appears to be, that no circumstance, which is of itself a ground of action, may be set forth in the declaration; but that matter, which of itself entitles the party to no damages, may be stated in the declaration to enhance damages.

If to an action of assault and battery the Deft plead son assault demesne, the Plff may reply matter in justification of the assault; or traverse the Defts plea in bar in the usual mode of traversing in this case. de injuria sua propria non tale modo.

A conviction upon a public prosecution cannot be given in evidence in an action by the injured party for his damages, unless the conviction was upon the offenders confession, in which case the Deft in the action for damages, shall not be allowed to contradict what he has once confessed.

It is to be observed as a rule, that the plea answers the whole of the charge in the declaration.

Co. Litt. 263
2 Ray 229

Notes to the Revised

It has been attempted to maintain a second action for special damages, which were unknown at the time of bringing the first action & complaining not satisfied. No decisions are to be found in respect of this.

Sect. II.

A judgment obtained upon a contract against one of several joint & several obligors or promisors cannot be pleaded in bar by another obligor or promisor, till the judgment is satisfied; but one satisfied judgment against one of several wrong doers, may be pleaded in bar by another.

It has been adjudged by a Court in this State, that in case of a judgment against several wrongdoers, & satisfaction of sentence had out of one, no suit of contribution can be had against the other. No decision upon this point has been had in the Courts on this point.

Co. Litt. 118
11 Rep. 6
Carth 69

If the Jury sever the damages it is ground of an arrest by the Pltf. If no arrest is moved, the Pltf may release all but one & have judgment & damages agst him. If the Defts plead severally & it is found agst all, judgement will be entered up agst all for the damages found agst one. In the Eng. Act on action a custom exists of giving damages beyond what are found by the Jury, in cases of excessive beating & mayhem. No such usage in this State.

Coulter 233
2 Ray 76

In other cases than those stated in the Pltfs declaration may be proved, if the Defts plea is not guilty; but if the Defts plead "son assault demesne or, I suppose, any plea in excuse or justification, the Pltf is confined to the time laid in his declaration.

By a Act of this State no more costs than damages can be recovered in the Ct of Com. Pleas if the damages do not exceed forty shillings.

Of false Imprisonment.

10 Rep. 70
2 Stra 229
Hung 493. 710

It has been a point much litigated with Eng. Ots. whether an officer is liable for having executed a warrant, which for aught that appears upon the face of it was issued by proper authority; but which in fact was issued without such proper authority. The adjudications of the Courts are generally that he is liable, tho not uniformly so. In the Circuit Courts of the United States it has been in one instance decided that the officer is not, in such case, liable.

In E. it has been uniformly decided that an officer, executing a process, for aught that appears on the face of it, by proper authority issued, cannot be made a trespasser, tho the process was, in fact, issued without authority. The established mode of pleading in the case of officers, very much favours this doctrine. It is a sufficient justification of an officer that he can shew a warrant or execution. He is not obliged to shew a judgement.

If a process is issued by a Ct having a right to issue a process in that matter, there is no question that the officer cannot become a trespasser in consequence of any informality in the process.

2 Wils. 67

It is required by the St authorising Justices of the Peace, in cases where no officer can be obtained, to direct the writ to some other person, that the name of the person, to whom the writ is directed, be inserted by the Justice himself; if in this case, the name was inserted by another person, tho it were unknown to him also inserted his name, yet if he executed the process he would be liable in trespass

2 Wils. 158

If a Ct takes cognizance of a matter, not cognizable by it, or any way takes upon itself to exercise an authority, in cases where it has no authority given it by law, it is liable as acting entirely without right; but against errors committed in determining matters clearly within its jurisdiction, every Ct is protected.

False Imprisonment

1 Dun 156

Unnecessary abuse of one wrongfully imprisoned is false imprisonment. So is one arrest for the penalty for the breach of a bye law. If any officer arrests or continues to imprison after receiving a supersedeas, or any thing which has the operation of a supersedeas, he is liable for false imprisonment. An arrest after a party has the protection of court is false imprisonment. The cases in the Eng books seem to be contradictory to this doctrine. These cases may be reconciled with our laws, by considering the manner of carrying into effect the same matter in Eng. & the manner of carrying it into effect here. There it is usual to obtain a protection before going to Ct; in Eng. the privileged person goes to Ct & then obtains his protection. If the one who has a right to be privileged, is arrested in going to Ct & before obtaining a protection, which appears to have been the fact in the cases in the books, the Ct will discharge from the arrest, but the arrest is not a trespass.

Salk. 78
Wms 157
Hard. 323
2 Wils 274
Bull. N.P. 24

An arrest on monday is void. If an officer, thro mistake arrests the wrong person, even if he be led into the mistake by the falsity & deception of the person arrested he is liable in an action of false imprisonment. See ante. Law arrests

False Imprisonment

Bul. N.P. 28-27

An action by one agst another for adultery with his wife is in form of an action of trespass vi et armis, but in fact founded on the corp. By the decisions in the Eng books the husband may maintain this action, tho he permit & even consent to the transgression. If, however, the husband keeps his wife as a com. prostitute, it has been decided that no action lies. (Mr Lutwyche to come in here

Bur. 2854

Under not guilty, which is the genl issue to be offered no interest in the pltff or any matter which denies the manner of the trespass may be given in evidence - nothing but that which goes directly to prove the charge false.

Hob. 127 — It is said, that if either of these matters is
1 Jon. 163 — plead specially, the plea may be demurred
10 Rep. 95 — to; but the truth seems to be that if a
1 Eliz. 1.6 — plea amounts to the gen issue a motion
262 - 319 — should be made to the Ct that the gen.
issue be entered. But matter in justification are to be pleaded specially. It is sufficient
Earth 1 13 — for an officer justifying under an execution
pursuantes to be on a judgement, but all
others must show a judgment. It is a settled
rule of the Eng law that every matter in justification must be specially pleaded & nothing
by way of justification, not pleaded, can be
given in evidence to mitigate damages. It
is otherwise in Q. An agreement to submit to
an aud does not take away the orig. right of
action, & of course is no defence set on aud
9 Rep. 79 — and shown, made in pursuance of the agreement.

416

Of Trover

This action was originally built in no other case than where the goods had been found. The use of this action is now greatly extended, & is common in very many cases with trespass. It is concurrent with trespass where the taking is tortious and there is an conversion of the property, unless the trespass is the destruction of the property. It also lies where the taking is lawful, but there is a wrongful conversion. If the taking is right, but & no actual conversion can be proved, by the demand & refusal this action may be brought, & this is the only proper remedy.

Stra 128

To support this action property in the plff & possession & conversion by the Deft are the only things necessary. If a tortious taking is proved no other conversion is necessary; if the Deft came rightfully into possession an actual conversion must be proved or something equivalent to it; which is a demand & refusal. This is considered as evidence of a conversion.

Salk 290
Stra 800
Co. Lit 103

Trover does not lie by one tenant in common against another tenant in common, unless there is a total conversion of the property.

TROVER

A judgment recovered in an action of trover vests the property in the Defdt.; & if he has sold it, saves the title of the vendee. This action lies as well agst a vendee for the property in his hands, as agst the original wrongdoer. This is, however, not the case if the property is in money or bank bills which pass as currency.

Bac. 152

Trover lies not for a trespass upon real property, notwithstanding an, motion.

Such a tage of property as is barely real is no evidence. Trover is a proper action for a pledge after Tender & refusal. It also lies agst a bailee of the cows the property no owner further than he has a right by the bailment. If the property is stolen & ~~cannot~~ this action cannot be maintained agst him.

C. Jac. 255
Salk. 655 1 18
Hob. 11
Co. Jac. 330
S.C.

The gen issue & a release are said to be the only defences which can be made to this action this appears to be law with one or two exceptions. A. C. any matter may be specially pleaded as in other cases

Cab. 554
4 Mod. 258

Note – If an officer pleads jointly with another, for whom a warrant is no justification, he loses the benefit of it.

Shang. 509

It has been a litigated point whether brown lies for money. For pieces of coin which can by any means be identified to a certainty, there is no question, but this action will lie. It is in this case. Indebitatus assumpsit & brown an concurrent. This, however, is not the only case.

In all cases where several actions are concurrent, a recovery in one action is a bar to a recovery in any other.

Of Replevin.

A writ of replevin may be had in two cases in Eng. & also in two cases in this country. It is a writ to be had in Eng. to recover back the possession of property distrained for rent or service. Upon taking out this writ, pledges, i.e. bail or bond must be given to return the property distrained, or respond what may be recovered by the distrainor, if any thing. This is peculiar to Eng. But the rule of law that undoing property liable to attachment, adopts the principles of the Eng laws relative to distrainee for rent. A writ of replevin is not grounded on controversy between the two parties concerning the right to distrain, or of attaching by the pd. of that which is taken; but is designed to secure the party whose property is taken from the inconvenience of being deprived of the use of his property, at the same time the party taking it is secured in all the advantages which could accrue by having the property in the hands of the Sh.

A party has liberty, obtain in this writ of taking the Pledges upon him to return or respond. This party whether defeats the designs of an attachment by delivering him of the security he gives by having the property attached. By the bond he has no other credit than that of the debtor, which he before had.

Difficulties have arisen in determining to what extent the bondsman is liable in case the property attached falls short of satisfying the judgement recovered, the bond being given to satisfy the judgement. It seems reasonable that the liability of the bondsman should be limited to the value of the property replevined, but the words, the bond cannot extend to the judgt. are hard to be avoided.

Doubts are entertained relative to the liability of property attached and replevied to be immediately seized upon and attached by another creditor. This depends on the contract or stipulation, between the owner & him who replevins. If the bondsman depends on the property for his security, it would be unreasonable to deprive him of the security by replevying it to be again immediately attached.

Replevin

cattle may be distrained damage feasant which is the case in Dig. & C. In this case the object of the replevin is to restore to the owner of his cattle; & may as well be had of the distrainer be rightful, as if it be without right. Under this writ the owner may claim that his cattle were wrongfully taken & distrained; if it so appear damages are recovered for the person trespass; or if it be not claimed, that the taking & impounding was unlawful, or if upon the owner's plea that they were unlawfully taken it is found against him, judgement is rendered for the damages done by the cattle distrained. In this as well as in other cases of replevin, replevin bonds must be given to respond damages.

Some cattle are called commonable others not. The former kind may not be impounded; unless they broke thro' legal & good fences. The latter may be impounded, if suffered to go at large.

Of Actions on the Case.

C. Eliz. 61. 10
Sta. 166
1 Vent 295
Co Eliz. 777
1. Lev 254. 187
Salk 662

This action lies generally in all cases of injury for which there is no other remedy. Not that it lies in such cases only as are otherwise without remedy. It lies for indirect injuries proceeding from an unlawful action act; or injuries which proceed from negligence. It is said to be concurrent with the trespass in some instances. This action lies for a refusal or neglect to do a duty, or for a breach of trust.

If one refuse a person legally arrested, or property attached he is liable in an action on the case. If the whole person or property is refused in possession a property out of which the creditor can satisfy his demand, the refuser is liable in damages for no more than the trouble of obtaining the debt which the refuser occasioned. But if the whole or any part of the debt fails of being obtained in consequence of the refusal, the refuser is liable for such part.

ACTIONS ON THE CASE

This action may be brought by the person in whose favour the writ issues, or by the officer. An officer may return a return informal in matter of process, but it is an ill return on a formal process. By the Eng. law the return of a return by an officer is conclusive & not traversable. our law is otherwise

Extra Remedies

Mandamus.

This writ is issued out of any Ct of general jurisdiction. It is in nature of an order to inferior Cts, ministerial offices, & corporations to do that which it is their duty to do: to restore those who have been unjustly removed from their offices, & those who have been unjustly deprived of their emoluments to their privileges — also to admit to offices or privileges they are entitled to them.

The mode of proceeding at com. law was for the injured party to file his bill of complaint in some Ct of gen jurisdiction, & make affidavit to the truth of his complaint. Such affidavit & complaint being made in the body of such Ct to issue to the Ct, officer or corporation upon whom the complaint is made a mandamus in the alternative, to perform the thing required or show cause why it should not be done. A refusal to obey their order, either by performance, or by making an answer in a contempt of the Ct, & the party refusing will be attached, on a second attachment issuing against him & imprisoned till he complied. If there be an answer made which the complainant

thinks insufficient he may demur to it; & the answer being adjudged insufficient the Court will then a peremptory mandamus to do the thing required by the complainant; & on disobedience an attachment will then be a contempt, &c as before. If the answer made contains sufficient cause the answer is not traversable, & there can be no further proceedings. If the answer be false, there may be an action on the case for a false answer; & if it be found that the answer made be false a peremptory mandamus will issue &c

The St of Ann enacts several regulations relative to a Mandamus; but that part of it which is of consequence in this State, under answers traversable. This clause the St in C. have adopted, as being reasonable, & not because it is an Eng. St.

A Mandamus is never issued to restrain proceedings, but always requires something to be done.

Habeas Corpus is a writ recognized by the com. law. The com. law, feeling it is the law in this country. A Stat. was made affirming & explaining the com. law in this subject; & in some instances extending the right of this writ further than the com. law extended it.

3 Wils. 172

In all cases of an illegal restraint of the liberty of one by being confined by another, whether a wife by a husband, a child by a parent, a servant by his master, or one stranger by another, this writ may be sued to restore the person confined to his liberty. This writ may at all times be sued by any one who is imprisoned or kept in confinement or execution, or in times of public danger, when, as has sometimes happened, the right of this writ has been suspended, for a time. This writ issues to bring the imprisoned commanding him to have the body of the person imprisoned before the Ct., & then shews the reason of the imprisonment. If the Ct on enquiry, find the imprisonment legal, the prisoner is remanded; if the cause of commitment is for a bailable offence, the Ct admit the prisoner to bail; if the imprisonment is found to have been without cause, the prisoner is set at liberty.

Stra 1161

Prohibition

Mar 1795
Mar 1796

A writ of habeas corpus will be granted at the request of any person. A writ of habeas corpus ad testificandum is issued by a Ct to bring a prisoner before them to testify. It seems that in eng. that the Cts had no authority to issue this writ to one imprisoned on execution till a law of which ch. said was made enabling them to do it.

Prohibition

The multiplicity of inferior Cts in Eng under the writ of Prohibition a remedy of inferior use; but in C. it is little known. In Eng it is issued by all the Cts of com jurisdiction, & in this state by the Sup. Ct to restrain an Inferior Ct from proceeding in a matter of which they have not a competent jurisdiction. The manner of proceeding in obtaining & enforcing a writ of Prohibition is for the Dept in the inferior Ct to represent to the Ct to which he makes application for a Prohibition, a copy of the process, with which he is served, & make affidavit that the copy is a true one, asserting for the reason why the inferior Ct is incompetent to have jurisdiction of the matter. If it appears on the face of the copy that the Inferior Ct has not jurisdiction, a prohibition issues to the inferior Ct & to the party to stay proceedings in the cause. Disobedience to this order is a contempt & punishable as such; but if the copy was a false one the prohibition is disregarded & such disregard is no contempt.

Prohibition

2 Roll 317

12 Rep. 59

1 Sid. 65 - 178

Salk. 628

If the jurisdiction of the Inf. Ct is doubtful in aught that appears by the copy, a prohibition together with an attachment to bring the party into Ct for the purpose of trying the question whether the inferior Ct have competent jurisdiction or not. If it be found on trial, that the Inf. Ct has not a right to try the cause judgement is rendered for the complainant to recover his costs; if it be otherwise found, an order is issued to the Inf. Ct to proceed, the prohibition notwithstanding

A Prohibition will be granted while any of the proceedings of the Inf. Ct remain to be carried into effect — if judgement has been rendered, to stay execution — if execution has been rendered, to prevent a levy of it.

Courts in Connecticut.

The Judicial Cts of this State are — the Cts of Justices or Justices — Cts of Common Pleas or County Cts — the Supr. Ct. — the Supr. Ct of Errors, & the General Court. For the powers & jurisdictions of these Cts respectively, see the several Stats respecting them.

In a civil suit the species of process are a summons & an attachment. The one or the other of them may be had, at the election of him who institutes the suit. The former is a mere notice to the party on whom the demand is made, of the demand of the Ct in which the trial is to be had, of the time & place of the sitting of the Ct — the latter is for the additional purpose of securing property to respond the judgement, or if property is not to be found to arrest the body of the Deft. When the body is arrested on mesne process, it is the duty of the officer to admit the person to bail, sufficient bail being offered. This doctrine of bail is wholly regulated by St.; but the law was made in affirmance of the common law.

A bail bond is not forfeited by a non appearance of the party bailed at the day; it is sufficient, if he be surrendered to the officer during the life of the execution; or rather if he is surrendered or taken before a non est inventus is returned, which may be before the execution expires.

If the bondsman surrender up the body in Ct he is discharged; & to prevent the imprisoning the debtor att the time of trial, he is again admitted to special bail. The forfeiture of the bond is also in this case cured, if the body is given up to the officer or taken by him before a non est inventus is returned on the execution. The principle which governs in the construction of bail bonds is, that if the Pltff loses no advantage, of which he could have availed himself by having the body delivered at the day, as literally specified in the bond, he has no cause of complaint; & therefore can have no reason to claim a forfeiture of the bail bond.

An officer, having arrested the body, becomes liable to the Pltff if he fails to have the Defdt before the Ct. & for his own security bail bonds are taken. Such bond, in case of a forfeiture are, to save a multiplicity of actions, assignable by the

officer to the creditor; & the creditor is obliged to take the assignment, if the bail bonds are sufficient. But if the officer has taken insufficient bail he himself is liable. If, however, an officer take such bail, as at the time of taking it could not reasonably be doubted but which has a subsequent bankruptcy or, the bondsmen were insufficient, he is not liable, as having taken improper bail. This decision has been made on this point by the Sup: Court in this State.

Any action on a bail bond is barred by the statute but within twelve months. Months here & in papers means lunar months.

Bond to pay costs if the action is not supported are not usually required on quashing a mesne. But if the Plff be not an inhabitant of the State, or if he be that not of sufficient estate to pay costs, bonds are required. In ab: & for the Deft may require that bond be given to answer costs if the Plff fails in his action. But there is no liability on the bond, which is given for an inhabitant of this State till a non est inventus is returned as to property of the principal.

In all cases of an appeal, bonds to prosecute the appeal to effect are required. It is to be remarked, that an appeal destroys all efficacy of the judgment rendered in the Ct below. The bond to prosecute is not only to answer damages for neglect to prosecute the appeal, but also to refund the costs which may accrue in consequence of the appeal. For these costs the surety is liable, if a non est inventus as to the estate of the principal is returned. Whether a surety is made liable for the whole judgment, by a bankruptcy of his principal, subsequent to the judgment in the Ct below, is a question not settled by any decision. Mr Dr. rather supposes that the bondsman is liable, as if the judgment is affirmed on an appeal, the surety ought to suffer no injury by the appeal. Sed quere de hoc.

No attachment is granted without bond. The bond is in this case merely to secure cost, & may be given by the Pltff himself.

Bonds are in like manner to be given, when an audita querela is granted.

COURTS OF COM.

A Writ of Error operates as a supersedeas, when this writ is taken out a bond with sureties ought to be taken, to impose all damages, which the Deft in Error may sustain. All damages means every loss sustained in consequence of the taking out of the writ.

Of the several modes of defending

Plea to the jurisdict.

See Plens & Pleadings post 725

An action may be defeated by a variety of means which go not at all to the merits of the case – of these the first in order is the want or improper jurisdiction in the Ct. The matter in controversy may exceed or fall short of the jurisdiction of the Court. The Defdt may be one privileged from suits in the Court, or from suits of that kind; the suit may be local, or a controversy relative to the title of lands must be in a country where the lands lie.

If the Ct has jurisdiction of the subject matter an agreement of the parties cures all informalities in the manner in which the cause comes before the Ct. But a want of jurisdiction which arises out of the subject of the controversy is not cured by agreement of the parties. If the Defdt appears & goes to trial without excepting to the jurisdiction of the Ct, it amounts to an agreement that no informalities shall be excepted to.

Plea in abatement.

The rule of law is, that a defdt must sign his plea in abatement in propria persona. This rule is not always adhered to in practice –

Plea in Abatement

A practice of giving costs to the Defts obtains in this State, when an action is dismissed because hort coram non judice. So a writ of error will be restrained on a judgment rendered by a court not having jurisdiction of the cause. These are practices of convenience, but are not defensible on strict legal principles.

Disability in a pltff is a cause for which a suit will abate — thus we find the pltff is a villain, a slave, an alien, in all real actions an alien enemy not within the protection of government, in both real & personal actions a feme covert, or not the husband of one in whose right he sues, as being husband. If several ought to join in a suit & do not it is matter of abatement.

If one is sued & another ought to be joined with him & is not, he may plead it in abatement. All debts of a partnership are considered as debts of the Partners jointly & severally; & if all are not joined in a suit agst the company, it is matter of abatement, but cannot be taken advantage

Black 957

Bac. 2611

of under the gun shot. Which suppose that the reasoning of the judges in the cases cited in the margin, goes equally against the omission to ~~plead~~ mention the names of all the partners, in abatement as to pleading in bar.

The death of the Pltff causes a writ to abate. So does a misnomer, the omission of an addition when an addition is necessary, or a misnomer of the Pltff or Defdt's place of abode. Coverture is a cause of abatement, for a woman is sued as a feme sole. Misnomer of the Defdt, omission of addition of the Defdt, or a misnomer of his place of residence is a cause of abatement.

Variance in the obligation declared upon, is that when an error is cause of abatement. Departure from the legal steps of process, want of signing by proper authority, payment of duty not due to fine on the writ, or a neglect to take bond, where bond are required, have the same effect.

Writs in Attachment

The words of the Act are, that an attachment shall be served by attaching the property, or in default of estate, the body of the Deft; & also by leaving a copy of the writ and a description of the property attached with the Deft at his usual place of abode. It has been questioned whether service by a copy without attaching the estate or body of the Debt can be pleaded by the Deft in abatement of the writ. It has been decided that the Deft can take no advantage of such service; but that such service may be set aside by the Pltf.

An omission to leave a copy of the attachment & description of the estate attached, in case of real estate attached, at the town Clerks office, where the estate lies, does not abate the writ.

It is a point which yet remains to be decided, whether a malicious attachment of property, with a design solely to vex, shall abate the writ.

A prior suit pending properly adapted to the cause of action will abate a subsequent suit for the same cause of action. But a bill in Equity is not affected by a suit at law. If two proper actions are commenced the same day both abate.

Hob. 128

It is a rule in pleas of abatement that the Deft must show the Plff how he may amend his writ. This however does not extend to things within the knowledge of the Deft, or omitted by his negligence. Duplicity of pleading is not allowed by the Eng laws. By our laws several pleas of abatement may be pleaded at the same time.

Matters which are causes of abatement, not pleaded in abatement are no causes of error; but if pleaded & overruled by the Ct, they are causes of error in the judgement.

By the principles of the com. law no amendment may be made in a process, which amendment does not correspond with facts; but if in the process, there be such error in fact as abates it, the error in fact may be corrected & the real fact stated. It is not to be understood that

Wellington v. Solomon

that the statute which enables the Pff to amend gives him a right to make new additions to his declaration, or supply any deficiency of matter in it by making any new allegation.

It is now settled by our Cts, that it has been a matter disputed, that if, after amendment the party amending have judgement he shall have no costs which accrued previous to the amendment except for the writ & service. If after amendment there still remain other causes of abatement they may be pleaded.

If a plea in abatement be a matter of fact, in Eng or Germ terms the fact is set forth against him who pleads it, judgment in chief is awarded against him upon the presumption, that he has no better grounds of defence. This practice has not obtained in this State, it may be the case in other St.

Demurrer

In the course of pleadings, the next step after causes of abatement are got over, is a Demurrer. This is a defence grounded on the insufficiency of the Pltfs declaration, either as to the grounds of complaint stated in the declaration, or as to the manner in which the complaint is stated.

Co. Lit. 72

It is to be observed that a demurrer admits all the facts, stated in the declaration to be true, i.e. it admits all the facts which are pertinent to the case, & which may be legally proved. But impertinent allegations, & allegations which cannot be legally proved, as a plea of release of a bond, are not admitted. Neither are mere matters of form admitted by a demurrer.

If the subject matter of the declaration appears to be such, as gives no right of action; or if, notwithstanding the subject matter of the declaration may be sufficient, some essential allegation is omitted, there may be a general demurrer to the declaration. When the substance of the declaration is a good cause of action, and all

necessary allegation can made, if an essential allegation be not a statement of facts, but an inference drawn from facts by the Pltff, it is a cause of a special demurrer; the being the province of an Ct to make the inference from facts, & not left to the party to judge of the legality of his own acts.

If it is a rule in pleading, that one who grounds himself upon a written instrument, must recite the instrument in the words of it, or according to what he thinks is the legal operation of it. If the instrument is recited construe literally & the construction given it is not, in the opinion of the other party the proper construction, then it may be pleaded in abatement, as a variance, yet he may, for the purpose of trying the cause on the merits, pray over of the instrument; & then by citing it in the words of it, making a of the declaration or a plea of the party grounding himself thereon, he may demur to the whole.

If a Declaration contain different matters, some of which are stated by the Pltff insufficient, he may demur to the insufficient parts & take issue upon the rest. The com. mode is to traverse the substantial parts & demur to the rest.

plea in bar

When the declaration is good both as to fact & form, it remains for the Deft, to make a defence, either by denying that the matter stated in the declaration is true, or by showing some reason why there should be no recovery. In the former case the gen issue is to be pleaded; in the latter, the special matter to be shown as taking away the pltfs right of action, is the proper subject for a plea in bar. But by the practice of the Eng Cts, & by Statute the special matter may be given in evidence under the gen issue, excepting the defendancy, release or other acts of the Pltff by which the Deft is defendant or acquitted of the demand

If there are several allegations & one only on which the case depends, it is usual select out that one & traverse it. The principle advantage of this mode is that it directs the attention of the jury wholly to the single point of importance. Such a traverse of a fact admits all which is not traversed. A judge has a power of introducing a protestando of other matter

not traversed. A postea made, which supposes has no effect. The use of it originated when the facts not traversed, such is admitted as that the party was forever concluded by them the purpose then to be answered by a postea made was not to have any operation in the suit then pending; but to prevent any effect by an admission of the facts in any other matter not connected in the present case.

It is a rule that there cannot be a traverse upon a traverse. To this rule there are the following exceptions. 1. When to a good & substantial plea, replication &c to a declaration, plea &c & a traverse of an immaterial fact; the adverse party to the plea, replication &c. to which the traverse of the immaterial point is annexed, is not obliged to join in the traverse; but may demur to the traverse, or, if he wishes to try the merits of the case, he may traverse the substantial plea, replication &c. 2. In a plea of a confession & avoidance, which goes not to the whole & a traverse of all, to which the confession & avoidance do not extend, the adverse party is at his election to join the traverse, or to traverse the facts alledged in bar of a recovery on the matter confessed.

Besides the several modes or matters of defence already mentioned, the Deft may admit the facts stated in the declaration & plead any matter, which cuts off the Plfs right of recovery, the truth of the allegations in the declaration notwithstanding. Such matters as deprive the Plf of a right of recovery, admitting the declaration to be true, is a proper subject of a plea in bar; tho it is not in all instances necessary, that it should be pleaded in bar, it being, in many cases, admissible to give it in evidence under the gen issue.

A plea in bar must answer the whole declaration, & cannot be made complete by any new addition.

A plea must be but a single defence. More than one ground of defence is duplicity & ill. If there be two defences it is still duplicity, tho one is improper.

1 Burr 316

Pleas in B.R.

A Demurrer concludes to the Ct with an averment of the insufficiency of the Pltffs declaration, & prays judgment. Formerly traverse did not conclude to the country, but the adverse party replied in the words of the traverse. The last rule in the Eng Cts is to conclude a traverse to the country. The old practice obtains in this State, & rather it is more usual to conclude to the country mentioning it to be by agreement of the parties.

When a plea introduces new matter it must not conclude to the country, but an opportunity must be given to the adverse party to answer it.

Prepleader

If an issue is misjoined or joined on an immaterial point, a repleader may be had. But if it appears on the record that the plea is without merit, no repleader will be granted.

Mr This is all by Mr R. on the subject in this Cause of Lectures
I think it best to put in more from other Lectures or from the books

Of Arresting Judgement.

The Eng. Cts will arrest judgement for no cause which does not appear on the record. In C. judgments is, in some instances, arrested for reasons which the record does not furnish. If the declaration be insufficient is not aided by a verdict, & judgement will be arrested for such insufficiency. If issue was joined on an immaterial point the same consequence follows; as if issue be joined on a bad plea. Vide post.

If the evidence given does not support such facts in the declaration, as are necessary to entitle to a recovery; the evidence may be tersely stated in writing, & demurred to. It is a rule of the Eng Cts that the party must join in demurrer to written evidence, but not parol.

A bill of exceptions may be filed to any interlocutory judgment of Ct. In this bill must be stated all the facts of the question & the decision of the Ct, & this statement, if a true one, it is the duty of the presiding judge to certify. This bill is made a part of the record.

Of Writs of Error.

A Writ of Error is always grounded on a mistake in law & not in fact. Thus in case of a special verdict, a mistake of the law upon the facts found by such verdict, is cause of error. But a decision not according to law of hearing on the merits of the is a good ground of error.

A writ of error is a commission to a superior Ct to examine the judgment of an inferior Ct & determine whether such judgment is according to law.

1 Rol. 771 - 805

A Ct of Error gives different judgments to Plffs in error from those to Defts in error, & this difference is owing to a consideration of the purpose of suing, whether the Plff or Deft in the original action. In the one case the object of the Plff in error is to obtain a reversal & to destroy the judgment complained of as not according to law; & the decision of the court is either affirm or reverse the judgment. If the former judgment is affirmed, another judgment is awarded for all the costs arising in consequence of the delay occasioned by the writ of error. If a judgment is reversed, a new judgment is rendered for the Deft in the Ct below to recover the costs which he ought to have recovered in the lower Ct on the former judgment. In the former case when the writ of error is brought by the

Dro. Law 512
509 - 512
Carth 243
4 Mod 106

Error - Writs of

Pltf, if the judgement is affirmed, no judgement is necessary; but if the judgement is reversed, the Pltf may enter his cause in the Ct (if it is error on judgement of Ct of Com. Pleas in the Supr. Court) & the parties go to trial in the same manner as if the cause had come up on appeal.

If Error is brot in the Supreme Ct of Errors on a judgement of the Supr. Ct, & that judgement is reversed, the Defdt in error cannot enter his cause for trial, as he may in case of judgement of the Ct of Com. Pleas reversed in his favor by Supr. Ct; because there is no jury in the Supr. Ct of Errors to try the facts. A cause in these circumstances is remanded in to the Supr. Court for a new trial.

Ero. jur. 284
Cartlr. 319

If execution has been taken out on a judgement rendered in the Ct below or Ct of C.P. & levied on the property of the Defdt, in the reversal of judgement in the Supr. Ct, that Ct will give judgement for the property taken on execution as well as a judgement for the costs which he ought to have recovered in the Cts below.

The Lords Ct on reversing a judgment of the Ct of Com Pleas will render such judgment as the C.P. ought to have rendered.

It is a rule of the Eng law that if a judgment upon record is erroneous as to one, it must be reversed as to all. This appears to be an arbitrary rule, & the Lords Ct in C have given one judgment in violation of it. Vide post

Cro Jac 289

It is a rule that if there is a verdict on any special matter where there might have been a gent. demurrer; & verdict is found in favor of the party whose plea in bar is insufficient. Judgment may be arrested. But any untrue statement of a material allegation in any plea, replication &c, which is good in substance but bad in form, which are cases of a special demurrer are cured by a verdict, & of course are no grounds of error. These defects being cured by the verdict in the first form, when that the jury found all the facts substantially, tho, not formally stated or imperfectly stated; if the point in issue to the jury be such, as gives no ground to presume that such facts were found, the informality is not helped by the verdict & judgment will be arrested.

Doug 654

2 Lord. 233 or 2 L.

Error — Writs of —

1 Ord. 178
C. Gen. 246
8 Chap.
Yelv. 179

If before a Writ of Error taken such execution is taken on the judgment, & land or real estate, a reversal of the judgment takes away the title acquired by the execution, unless the land is bound from him who took it by the execution, in which case the purchaser shall be quieted in his possession.

A writ of error bonds being given is a supersedeas to all proceedings on the judgment. Bonds are, in this case, to answer all damages which may arise in consequence of the writ of error; & care should be taken that they be sufficient to embrace all damages which may be incurred. This writ must be signed by one of the judges of the Ct in which the error is to be tried; & it is questioned whether such judge is not liable to party in case insufficient bonds. There is a strong reason for his liability, but there is no decision determining it —

It has been said that no one fault or point is a ground for a writ of error. It is true, that the finding of a jury cannot be questioned, & no writ of error lies, for the reason that the finding of the jury decides facts; but certain facts, without proof of the Ct not within their knowledge at the time of the judgment, & which have never been in issue, are causes of error. As if it appears on record, that an infant did not appear by guardian; or if there be a judgment by default against one who has not been within the state since the service of the writ; in which case the St requires that there be a continuance. This writ of error may be tried in the same Ct in which the original judgment was rendered. Error in fact & in law cannot be assigned in the same writ.

Said Bill.

If the cause of the new trial is by the fault of the party asking such new trial, payment of costs is required before such new trial will be granted; but if it is the fault of the Ct. which gives ground for a new trial, payment of the costs is required or not at the discretion of the Ct.

There is a great variety of causes for which a new trial may be granted; many of which, in this State, are causes for which a writ of error also lies.

A new trial will be granted for any misconduct of the jury; or for any misdirection of the jury by the Ct. But this latter case cannot happen in this country. The admission or rejection of testimony, which ought not to have been admitted or rejected, as the case may be; or a verdict found contrary to the testimony exhibited, is also ground for granting a new trial. Granting a new trial in this latter case is an encroachment upon the province of the jury & is done with great caution; & in cases only of manifest error by the jury. And in a hard case, no new trial will be granted for contrariety in the verdict & ~~against~~ evidence. In C. there is no instance of a new trial for this cause. A new trial because the verdict found is contrary to law, is common in England & instances have occurred in this State. Cts, however, are not usually

Strang 612

10 Mod 202

Strang 1112

Salk. 6. 16. 648

inclined to allow new trials for this cause. In a trivial matter a new trial cannot be obtained for contrariety in the verdict both to law & evidence. This rule applies to such actions only as are founded on costs. Small damage may be a ground of a new trial. In case of costs there is no instance of a new trial on the ground of new damages. Excessive damages are likewise a ground of a new trial.

2 Wilts. 205

Whether neglect of counsel is a sufficient cause for a new trial is questioned. It seems that a new trial will be granted in case the counsel mistake the defence & make a bad one, when a good one might have been made. But for actual negligence & blameable inattention, or ignorance for purposes of pleasure, or for any trifling & unnecessary cause, a new trial cannot be obtained; so is the current of authorities.

vide post

Law of Merchants

The Mercantile Law regulates the transactions of merchants, & differs in many respects from the com law. It was originally conceived as a custom. This idea is now done away. The mercantile law is, in fact, the com law of this species of transactions, & does not, like a custom, require to be proved & specially pleaded; any more than the gen com law; the Ct being obliged to perceive & judge according to it as the gen & ordinary com law. There, indeed, mercantile customs which are local & exceptions to the law of merchants; & are to it the same, that custom is to the com law.

Jan 1663 A contract, without consideration, is void at com law; but by the law merchant, if one actually undertakes, he is bound to perform, notwithstanding the undertaking is without consideration. The maxim of the civil law, ex nudo pacto actio non oritur is not applicable to the law merchants

Fraud, at the least degree of unfairness totally destroys a mercantile transaction; but fraud & unfairness have not this effect at com law.

If a cont. be reduced to writing no action by the principles of the com law can be brot on the writing, such writing not being a deed, & the writing can be made use of for the purpose of proving the contract only; but by the law merchant the action may be grounded on such writing. So the com law does not enable the assignee of an obligation to sue upon it in his own name; but the law merchant allows it. The com law, indeed, allowed not of the assignment of a chose in action, making it a crime to purchase one & punishing the purchaser; but now the Ts will not permit a purchaser, if the purchase is not made with a mischievous design. In mercantile transactions, any chose in action is assignable, & the assignee may, in his own name maintain an action to recover it.

The com law & law merchant, relative to the effect of a discharge from prison of one of several joint debtors, are different. By the former if the creditor pursues his remedy against one & imprisons him, and afterwards releases him from prison all are discharged — by the latter, the release of one does not exonerate the rest.

Law Merchant

A mere gratuity cannot by the common law impose no legal obligations on the receiver. But the law of merchants raises a contract upon a gratuity, intended as such, & which the receiver is in honor bound to recompense. A gratuity, however, which binds not in honor, raises no contract.

If a merchant have sold goods to another, for which he has not received payment, he may, on discovering the vendee insolvent, for payment return them, & retake them in transitu, that is, before they come into the possession of the vendee. This the common law does not authorize.

It has been already observed that fraud in the consideration totally destroys the mercantile transaction a cont. It is now to be considered what amounts to such fraud.

Lord Mansfield

Any underhand or sinister transaction which gives a false appearance, & which can at all serve to endear the party undertaking so to undertake, is sufficient to destroy the efficacy of the transaction. A suppression of the truth, or a false suggestion have the same effect. But a man's own opinion or the opinion of others relative to the event which may affect the transaction he is not obliged to disclose. No fact, the knowledge of which would, in any degree influence the party undertaking may be concealed

It is a rule of the common law, that parol testimony is not to be admitted to contradict written testimony – to narrow, extend or vary it – or any written instrument. In adjudications of matters of a mercantile nature, the Ch have often deviated from this rule.

Bills of Exchange

6. Ch. 30
Ch. 18

Bills of Exchange are orders drawn by one person on another to pay the sum specified to a third person or order, or to a third person or bearer. They are instruments are capable of being negotiated. Such as are payable to a third person or his order are negotiated by an indorsement of such third person's name on the back of the bill; which third person is still the owner of the bill. This indorsement by the payee of his name upon the back of the bill is sufficient authority for the drawee, the person to whom the bill is directed, to pay the contents to the indorsee or bearer. It is to be remarked that a blank indorsement may at any time be filled up with a direction to pay the contents of the bill to any person whose name is in bills. To negotiate bills payable to bearer no indorsement is required; but the bearer after acceptance of the bill, may demand payment, & commence a suit in his own name, if payment is refused.

Bills of Exchange are made payable ~~to sight~~ on sight, in so many days, in so many months, after sight, from date or on usage. Usage is a term of time of different length in different countries.

which is by the usage of Merchants, allowed for the payment of a bill after sight. Three days, called days of grace, after the time in which a bill is made payable are, in all countries allowed for the payment, except such bills as are made payable on sight which are to be answered immediately. If the third day of grace falls on sunday payment must be by the law merchant in Eng be made on the day preceding. But the com law if payment fall on sunday it might be made the monday succeeding.

A time to be reckoned in so many months from a given time at com law means in Eng means that it shall be in so many lunar months; but in mercantile concerns in Eng & in other countries a month means a calendar month.

From the date has been held at com law to include the day of the date, & from the day of the date to exclude the day of the date. By the law merchant, from the date & from the day of the date are taken to mean the same thing & always include the day on which the instrument is dated. according

S. Ray 280
Stra. 229

Bills of Exchange

Cowp 714

to L. Mansfield's decisions these perhaps mean the same thing at com law, & are to be construed the same thing, inclusively & exclusively on the reason & justice of each particular case may require.

Bills of Ex are divided into two kinds - inland & foreign - this distinction is not necessary in Eng, inland bill being placed by K on the same footing as foreign. In this country, with the exception of a few states, no such K exists. But inland bills are governed by the principles of the com law.

Promissory notes are not negotiable by the com Law, but a promissory note to one or his order is within the description of a mercantile transaction, & by the Custom such notes are placed on the same footing as inland Bills of Exchange.

Any person capable of contracting may draw a bill of exchange. A Bill of Exch by an infant is void. A feme covert leaving a sufficient maintenance a living, which husband is beyond seas, may bind herself by a Bill of Ex. or she may make other valid contracts.

2 Ray 757

Bills of Exchange

10 Mod. 286
2 Show. 8
Black. 485
1 Str. 516

A distinction has been made between notes payable to the order of A. & such as are payable to A or his order; the former being considered as payable not to A himself, but to his order only. No such distinction now exists; & a bill to A or bearer is negotiable.

Bank Bills are to nearly all, if not to all purposes money. If a bank bill be lost or stolen, no action can be had for it in the hands of a bona fide purchaser for a valuable consideration. The bill being in such case considered as money, not distinguishable from money. Whether these bills are a lawful tender has been in no case directly decided, but the dicta in long house appear to favour the idea, that they are a tender. In corroboration of this idea that they are money is the practice of allowing them to be a good & valuable consideration for an annuity,

3 Burr. 654

when the St makes void all annuities, the consideration of which is not money.

Bankers Notes are a kind of circulating medium distinct from bank bills. The receiver of one of these notes, may in case the banker fails, look to him of whom he received it, for payment.

Stearns 115-
516. 550

the holder, however, is obliged to keep
the note to a banker within a reasonable
time, or if the banker stops payment he
falls on himself. No exact length of time
is given, in which a bankers note must be presented,
to save the holder harm less on failure of the
Banker; the circumstances of the holder as to
opportunity to call on the banker varying
the period which might be adjudged reso-
nable, As to what is considered as a reasonable
time see the cases in the margin.

Stearns 910
248-1175

Bills of Ex may be declared on as specialties.

To Bills of Ex there are several necessary
qualifications —

Stra 1271

1. They must be for Money

3 Wils. 218

2. They must depend on the personal
credit of the drawer, and not on the credit
of any particular fund, which the drawer
has or may have in his hands. A Bill to

10 Mod 29;
8 Co.

pay out of any particular fund is no
Bill of Exchange, because of the uncertainty
of such a fund, or there being in fact such
an one of which payment may be made.

L Raym. 1361

It was decided that an order to pay out of
a growing subsistence was a good bill
of exchange within the St. But this
judgment which was obtained in the Court

3. Wils. 287

Common Pleas was afterwards reversed in B.R. The bare mentioning of a fund for the purpose of informing the drawee, from which he is to reimburse himself the drawer being intended to keep the bill at all events, does not vitiate the bill.

2 Ray 1481

This doctrine applies not to negotiable promissory Notes. They are good within the Act thos to be paid out of a specific fund. This distinction between promissory notes & bills of exchange is founded on an acknowledged indebitatus in the matter, which binds him to pay at all events. If an acknowledgment of value received is not essential to a promissory Note, which is probably the case, it may be a question whether a note without such acknowledgment would not stand on the same ground as a bill of exchange.

3 Wils. 213
2 Ray 1563
1 Bur. 325
2 Ray. 1362. 1396
4 Vin. Ab. 440
Stra 1251

3d A third requisite to a Bill of Ex. is, that it may depend on no contingency; & tho the contingency may have happened, & is known to have happened, it is still ill. Nor is a note in the alternative, as to pay an £100 if he does not under

the body &c or to pay of mention does not, a bill of exchange. But an order or promise to pay on the happening of an event, which is certain to take place, tho the time of its taking place is uncertain, is negotiable.

Stra 1217
Stra 24
1 Bels. 262.

And a physical certainty is not necessary it is sufficient that the event is morally certain. Note that all the foregoing cases of uncertainty in the time of the happening of the event, & of any moral uncertainty of the event, are cases of promissory notes.

2 Black 1072

A promise to answer with g.l. or order for £100- is negotiable note, tho it has been here to have questioned.

Stang 629

Whether an acknowledgement of value received is essential to a promissory note is a litigated point; but that it is not essential to a good bill of exchange is settled. It has been also debated whether to order or to bearer were necessary to make a note or bill negotiable. It is now settled that the words are necessary; tho the books afford cases of promissory notes which were not made payable to order or bearer, & which were held negotiable.

Hawes 25

1 Wilson 258

Hawes 288

A bill of exchange must be presented by the payee or the payee order to the drawee for his acceptance. After acceptance, the drawee is bound for payment. But if the drawee refuse to accept the bill, the drawee becomes liable to the holder; the holder taking such measures as are required of him, which will be hereafter pointed out.

Bur. 1674

The acceptance is usually in writing on the bill; it may be by a collateral writing or by parol. To a parol acceptance it is objected that it is an undertaking to answer the debt of another & within the St. of frauds & perjuries. The answer to this is that a mercantile transaction is not within the operation of that St; & secondly that an acceptance of a bill of exchange is not an undertaking to pay the debt of another; because the drawee is always supposed to be the debtor of the drawer, either by money or goods of the drawers in his hands; and an acceptance is no other than an undertaking to pay the debt he owes the drawer (& such debt he by the acceptance acknowledges) to the holder of the bill, for doing which the bill is his authority.

Bur 1674
Salk. 127
L. Ray. 574

The time of acceptance is immaterial; it may be previous to the drawing of the bill, subsequent to the drawing & before the bill becomes due or after it becomes due. In case of an acceptance after the bill is actually due, the money may be immediately demanded

Bills of Exchange

1 Atk 611 — No specific or technical words are necessary to make a bill of exchange or for its acceptance.

Comb 401 — Any thing written by the drawee on the bill, which does not imply a refusal to accept, is an acceptance. Saying "leave your bill here tomorrow & I will accept it" was adjudged a good acceptance.

3 Bur. 1663

Gilb L.C. 118

Bull N.P. 270 — A request by the drawee to another person to keep the bill is an acceptance; & it is immaterial that it be directed to be placed to the drawers account, or to be paid out of any other particular fund.

Strang 214 — "To pay according to the tenor the bill of the bill" is the usual mode of acceptance. If, however, the drawee will not accept according to the tenor of the bill, he may make a special acceptance, or he may accept to pay on another day than that stated in the bill.

Strang 1102

Strang. 9. — Likewise a conditional acceptance may be made to pay upon a certain contingency; & in all cases of an acceptance to pay in another manner than that which is directed by the bill, the acceptor is bound according to the import of his acceptance; & if his acceptance is conditional, to pay in a certain contingency, if the contingency happens he is bound.

1 Burr. 182

every indorser of a bill of exchange adds to it the credit of his name, & becomes liable to every subsequent owner of the bill, in the same manner as the drawer is liable to the payee & all others to whom the property shall be transferred.

~~Doug. 617~~

Doug. 617

The negotiability of a bill may be determined by a special indorsement so as to prevent any further liability of the drawer or of such as an indorser. But the innocent indorser of one who has stolen the bill may make good his claim against the drawer.

1 Black. 295

If one put his name to a note for a blank sum, he is bound to pay the sum with which the blank is filled.

Doug. 296

The negotiator of a bill, without indorsing it, is liable no further than to him to whom he negotiates it. To him he is not liable by the mercantile law; but in an action for money lent & recd, grounded on the principles of the com. law.

A blank indorsement may be filled up at any time & in such manner as the holder sees fit. It may be filled with the receipt of the contents of the bill; may be made an assignment of the property of the bill; a power to the owner & constituting him agent to collect the money &c.

1 Show. 163

Bills of Exchange

Comy 511
2 Bur 1222

The negotiability of a Bill payable to one or order originally is not restrained by the omission of the words "or order" in the endorsement; & the power of endorsing follows the property of the bill. the who has the legal ownership.

Strang 516

possesses the ~~the~~ right of endorsing, & not the person to whom the beneficial use belongs.

As an Ex^r or Admr may negotiate a Bill of his testators or intestate; & the husband alone & not the wife, can negotiate a promissory note given to he whole sole.

3 Wils. 1.
2 Show 509
Carthew 466

A Bill cannot be partially negotiate.

The Drawer of a Bill is, on the happening of certain events, & on the compliance of the payee or endorsee with certain requisites which, on the happening of those events, it is incumbent upon the holder to comply with, to save himself from loss, liable to pay the holder the contents of the bill, & respond all damages, which may have arisen, ~~which may have accrued~~ by reason of the non acceptance or non payment of the bill by the drawee. The drawer is liable to every endorsee & each endorsee to every endorsee, subsequent to himself. The ground of the drawers liability, is an implied contract between him & the payee, that the drawee shall accept

H. Black. 313 & pay the bill. To sustain the drawer liable the bill must be regularly presented for acceptance & for payment; to which there

Strange 949 is an implied undertaking on the part of the holder. A Bill payable on sight must be presented in a reasonable time for payment or the drawer is discharged. If the drawer refuses acceptance, or having accepted refuses payment notice of such refusal must be given to the drawer. & the law has prescribed what notice shall be given & the manner of giving it

A Bill protested for non acceptance must nevertheless be presented for payment

The indorser is, with respect to all indorsers subsequent to himself, the same as

Salk 128 the drawer.

Show. 444, 494

A judgment agst the drawer or agst an indorser is no discharge of any other,

3 Mod. 86 who is liable, till the judgment is satisfied. The body of one taken on execution is no discharge of another from his liability. If the one

Black. 1235 taken & imprisoned is discharged from prison, he is personally discharged forever from the debt; but it is said that his goods may be taken after his death.

Bills of Exchange

A Bill payable on sight must be presented within a reasonable time. What time shall be deemed a reasonable time is wholly undetermined; it depending entirely upon the circumstances of each particular case. When the day of a bill becoming due is set, it is reasonable that it is presented for acceptance before it is due. But if it is sooner presented & acceptance refused, immediate notice of the dishonouring of the bill must be given.

1 Term. 718

Burr. 2670

Notice to the drawer only does not enable the holder to charge an indorser, & by the general law of Merchants notice must be given to all the indorsers, where there are several, or none are liable; by the Eng. mercantile law, notice to one indorser subjects him & all prior indorsers.

A Bill may be protested notwithstanding a partial or conditional acceptance or an acceptance to pay after a longer time, or any acceptance not according to the tenor of the bill.

A Bill must be presented for payment
L Ray. 748 on the last of the three days of grace
or the drawer is discharged; & if the last of
these days falls on sunday, or some great
Stang. 829 holyday, it may or must be presented
on the second day; & it, if it be not paid,
it must be protested on that day. The
usage is to allow three days of grace on
Dunn. 169 negotiable notes; whether this is law
is doubted.

A Bill must be protested within
the usual hours of doing business.

It is the duty to give immediate
notice to the drawer; if he can find no such
man or the drawer, or if he has absconded, or
is insolvent, he must, then to the indorser
or indorsers of any.

The drawer of both an inland
& a foreign bill of exchange is liable, without
1 Dunn. 169 protest, for the contents of the bill, upon
the principles of the com. law; but the
bill must be protested to subject the drawer
to damages. Any neglect in the holder to
give notice of the dishonouring of the bill,
entirely exonerates all persons, who mi-
ght have been made liable by due diligen-
ce in the holder. A mere knowledge

that the bill is dishonored is insufficient; the notice must come from the payee, & attended with information that he shall look to the Drawer for payment. The holder is chargeable with neglect by the least degree of unnecessary delay in the giving of notice. If all the parties live in the same town, notice should be given the same day; if the drawer lives remote, notice must be sent the first post.

Doug 497

It is a presumption of law, that the drawee has property of the drawers in his hands, which is the reason why the holder must give immediate notice, that the drawer may take means to recover his property. This reason fails, when no property of the drawers is in the hands or possession of the drawee, (to prove this testimony is admissible) The drawee is liable notwithstanding no notice has been given. If, however, there can be a case of damage, arising from want of notice, when no effects of the drawers are in the hands of the drawee, the drawee is liable to respond such damages.

1 Burr. 480.

2 Burr. 714

This rule that notice to the drawer is unnecessary, to charge him to the value of the Bill, if the drawee has not effects in his hands, applies not to indorsers, to whom notice is requisite for altogether another reason, than that for which notice to the Drawer is required

1 Term 714

The legal mode of protesting a foreign bill & of notifying the drawer &c is by presenting the bill to a Notary public, or in default of such officer, to some substantial inhabitant of the place, who, having taken the bill, in the presence of two credible witnesses, if the protest be by an inhabitant who is not a notary, makes demand of acceptance or payment, as the case may be; & under a copy of the bill makes his protest, which protest must be transmitted to the drawer & indorsers to charge the indorsers. With a protest for non payment the Bill itself must be sent. If the drawee is not to be found, or has absconded, the bill is to be protested in the same manner. So if the acceptance is not according to the tenor of the bill, or if payment is only in part.

Beaver 160

If the Acceptor be in failing circumstances it is incumbent on the holder of the bill to protest it for better security; & notice must be given as in case of non acceptance, or non payment.

2 Show. 743.

Bills of Exchange

The holder of a Bill may, at the same time, pursue his remedy both agst the drawer & acceptor; but satisfaction of the judgmt by one, discharges his demand agst the other.

Beaves 161

Interest is to be computed on a bill down to the rendering of a judgmt. If there is a separate cont. for the interest none will be awarded by the judgmt.

Bar. 1086

The damages to be recovered agst the drawer or indorser are the real damages sustained. The uncertainty of these damages and the difficulty of ascertaining them have caused fluctuating sums to be established between one country & another; as between this country & Eng. France, Spain, Hamburgh &c

Against an acceptor no damages are recoverable.

If the acceptor is the debtor of the drawer, he may, on payment of the Bill, charge it to the drawer's account; if not his debtor, he has a right to an action by the law Merchant agst the drawer.

If the Bill is directed to be charged to the account of another & not to the account of the drawer, & the drawer accepts it accordingly, he must charge it to such third person, & cannot come upon the drawer; but he may refuse to accept on the credit of such third person & accept it on the credit of the drawer, in which case the drawer is liable.

Beaves 156

If the drawee is, in the above case, willing to accept neither on the credit of the drawer, nor third person mentioned, he may accept on account of some indorser on the bill, & by such acceptance of such indorser, all prior indorsers & the drawer become liable to the acceptor.

Note, the acceptance in this & the above cases is for the honor of the drawer or of the indorser & of course a protest must be made & notice given.

In case of no acceptance or non payment by the drawee, any other person may accept for the honor of the drawer. By such acceptance for the honor of the drawer, the drawer becomes responsible to the acceptor; but an acceptor for honor has no claim on the or any indorser. There may, however, be an acceptance of any indorser; & such acceptance creates a liability in such indorser, all prior indorsers & the drawer. But the acceptor for the honor of a drawer or an indorser, in order to charge to charge the drawer &c must enter a protest & give notice in the same manner as must have been done by the holder for non acceptance by the drawee, or any other person for the honor of the drawer.

Bills of Exchange

Acceptance is primâ facie evidence of effects in the acceptors hands. In an action, therefore, by the drawer against the acceptor, for damages for non payment, (to which the acceptor is liable if there were effects in his possession) it is incumbent on the Deft to rebut the presumption of the law & shew want of effects.

1 Atk. 189

After an unsuccessful application to a drawee indorser for satisfaction of a Bill which the acceptor does not pay, the holder may bring his suit against the acceptor, without notifying him of the insufficiency of the notice to the drawee indorser.

Doug 238

The express declaration of the holder either by parol or in writing, that he will no longer look to the acceptor for payment is a complete discharge of the acceptor from claim by the holder. But no act of the holder (vide post.) of omission, by implication such evidence of an intention of the holder to discharge the acceptor, as actually to discharge him.

Doug 237

An acceptor cannot exonerate himself by a revocation of his acceptance. In some parts of Italy a usage obtains of allowing an acceptor, not having effects in his hands, to revoke his acceptance and refuse payment, on finding that the drawer is insolvent.

Haing 183

If one accepts a Bill upon condition that effects come to his hands, effects do come to his hands & he again withdrawn by the holder of the bill the acceptor is not holden.

Doug 284

A receipt of a part of a bill does not discharge the drawer, if timely notice is given that the bill is not duly paid.

2 Wils. 262
1 Wils. 46

It has been questioned whether the holder must first report to the drawer, before he can come upon the drawer. It is now settled law that the holder may, at his pleasure, resort to a drawer or indorser.

Ste 441
Bur. 669

An action at com law or assumpsit action upon the custom of merchants, will lie in all cases where there is a privity of contract between the parties.

Bills of Exchange

Cowth. 88. 270

In declaring upon the custom of Merchants the ancient mode was to shew the custom at large; the actual mode now is to state no more than the custom generally. In the declaration it is necessary to state that A according to the custom of merchants drew a bill directed to B. payable to C & delivered it to C; that C presented the bill for acceptance that B refused to accept, & that the bill was protested for non acceptance & the time & place of making the bill it is also usual to state. If B accepted & did not pay, it must be so stated.

1. Show. 130

If the indorsee brings a suit against the drawer or indorser he must state the indorsement to himself. In case of several intermediate indorsees between himself, & the payee or first indorser he may if he pleases omit indorsements of all or some intermediate indorsements, & make himself the intermediate indorsee of the first payee, but if there are special indorsements intermediate, they must be stated to shew his right to claim payment.

The acceptor, having paid the bill, & not having effects from his employer against the drawer in an action by the custom of merchants; or for an action at common law for money had & received, which table is the more usual action in this case.

Bills of Exchange

3 Burr. 183
1, 91
1 Ben. 323

Bills of Ex are sometimes made payable to a fictitious person. These bills are to be treated as bills payable to bearer. & this being the operation of law, they must be declared upon as bills payable to ~~order~~ bearer.

1 Ben. 323

It was formerly an opinion that an action agst one only on a note made by several or on one purporting to have been made by several & signed by one only is not maintainable. It is now settled that a suit can be maintained agst one alone of several makers of a note, if the note be joint & several; & if joint no advantage can be taken of the note being agst one only unless it be pleaded in abatement.

Doug
Cowp 382

2 Roy. 538
1 Salk. 128
Carth. 509

In several decisions on mercantile transactions, it has been adjudged, that if the facts, which create the liability, are set forth in the declaration, there is no necessity of stating a promise; & if by the mercantile law a promise may be omitted, it seems, that for the same reason, a promise is not required at com. law.

A Bill which was intended for a bill of exchange, but which lacks some of the qualities requisite to a bill of exch. is still such at com. law.

Bills of Exchange

The holder of a bill may commence at the
2 Black. 794 same time, a suit agst the acceptor, drawer &
every indorser. Having obtained a judgment he may
take out execution agst all; but he may
take but one satisfaction. If after he has
obtained satisfaction of one, he proceeds to take
out execution agst another for more than
his costs of suit, it is a contempt. So after
a tender of the principal sum by one, &
Chang 515 the costs on all the actions the Ct will
order that no execution be taken out; & if
after the ptf proceeds to take out execution it is
a contempt.

In case of the bankruptcy of
2 Ves. 115 the acceptor drawer & the holder may
2 P. Wm. 89. 407 prove under such commission his whole debt
due at the time of making such proof; but
1 Atk 107 his dividend under the several commissions
must not amount to more than twenty
shillings on the pound.

The acceptor of a bill
Atta 946 may not question the drawers hand.
But in case there has not been an actual
2 Bur. 1354 acceptance, subsequent to the drawing, as
in case of a promise only to accept the bill
the hand of the drawer may be disputed by
the acceptor.

Bills & Notes

In an action by an indorsee, the acceptor may contest the hand of the first indorser, & ~~may~~ that the indorsement was on the bill when accepted, does not superseede the necessity of proving the hand.

1 Burr. 654

The indorsee in any action agst the drawer must prove the hand of the drawer & also the hand of the indorser. He must prove also his own diligence in presenting the bill & notifying the drawer of the non acceptance & non payment.

Doug. 682

In an action by an indorsee agst an indorser it is not necessary to prove the drawers hand.

One indorsee having given to the holder a dishonored bill, may sue any indorser prior to himself, or the drawer or acceptor or all of them. The actual payment of the money is not necessary to entitle him to sue & such payment, must be proved. Liability merely, to which he is immediately subjected on the non payment or non acceptance of the bill, upon the principles of the com law gives him a right of action agst his immediate indorser, or him from whom he purchased the bill.

2 Day 173

Bills of Exchange

10 Mod 86

The Drawer can have no Action agst the Acceptor, till he has actually paid the bill to the holder; after which the acceptor becomes liable to the Drawer for the value of the bill, for interest exchange, recexchange costs and damages. This right of action of the drawer agst the acceptor, is only in case of a set off in the acceptors hands, which the acceptor is taken to have acknowledge by his acceptance, till he proves the contrary.

1 Wils 185

An acceptor of a bill promising payment, & giving effects in his hand, has, in all instances, a right of action agst the Drawer.

The indorsee in an action agst the ~~indorser~~ drawer or indorser must have non payment by the acceptor: & this, the protest is conclusive evidence. So he must prove seasonable notice. And for this, non-protest proof of notice seasonably delivered into the post office has been held sufficient.

In Eng an indorsee must, in an action agst the Drawer, produce the bill itself, as well as the protest; but in other countries a protest is insufficient.

The usual mode of proving hands is by a similitude of hands. A confession of the hand is sufficient to charge the person confessing, but a confession of his hand by a drawer will not charge the drawer

Strang. 1051

If a bill is signed by a clerk, as is often the case it is necessary to prove that he was a clerk to the drawer, but it is not required that a special power was given him to sign.

After judgment by default, it is not necessary to prove the note by a writ of enquiry.

Strang. 1149
2 Black. 748
3 Burr.
1 Strang 1059.

It is a gen. rule of the mercantile law that inequality in the consideration does not vitiate a contract, even between the guilty persons. Innocent persons are not affected by the illegality. Contracts, the consideration is illegal under the stat of usury & gaming are, from the necessity of the case, exceptions to this gen. rule.

Doug, 708

A Bill payable to a fictitious person is considered as payable to bearer —

H. Black. 318.

Bills & Partnership

If several are parties to a contract, upon
3 Burr. 1818 an illegal consideration; & one of them, with
the consent, or under such circumstances
as imply the consent of the others, pays
a sum of money on such contract, the party
paying shall recover back the surplusage of
Cowp. 341 the money paid over & above his share; & a
bond to pay such share is good.

The gen. mercantile doctrine does not obtain
among Merchts.; for a stock on a farm subj=
1 Show. 189 ect to this rule. The survivor of several part=
Salk. 444 ners has a right to the book debts & of the
company; he alone has the right of com=
mencing suits for the recovery of company
money due; & he alone is liable in the
first instance to those who make out their de=
Cowp. 446 =mands on the company. This is all that sur=
vives to the partner. The Exr. may oblige the
survivor to account for the company property.
The Exr. may also collect debts & defend demands.
The Exr. is also liable for the debts of the company
& the creditor fails of satisfying his demand
by a suit against the survivor.

A judgment debt against a surviv=
2 Ves. 265 ing partner is still a company debt.

Policies of Insurance.

When one man gives to another a certain premium, in consideration that he undertakes to make good all losses, & any specified loss, & injuries to certain property, which may arise from certain accidents; the transaction is called an Insurance. This insurance is usually on property, hazarded at sea, & against those dangers to which such property, thus hazarded, is exposed. The instrument in which the whole of the contract, between the insurer & insured, is contained is called a policy of Insurance. Park on Inst. 1. Policies are either open Policies or valued Policies

Park. Inst. 1.

Losses are partial or total, & total is, does not, in legal conception, necessarily imply an entire destruction of the whole property. When a loss happens, there is not an entire destruction of the whole property, yet the insured abandons for a total loss, & the insurers become liable for the whole property. Upon in all cases of an abandonment for a total loss, the insurers stand in the place of the insured, & to them belongs such property as may be saved, & all the proceeds of which, otherwise would have belonged to the insured, now belong to the insurers.

1 Vas. 98

Policies of Insurance

The Law allows not of double insurances. To this rule there are some exceptions. Nor does the law allow of insurances to more than the value of the property insured. But the law is notorious in this respect to notice a small or double but excess of value, beyond the value of the property insured upon.

Insurance upon lives agst fire, is regulated by the gen law of policies of insurance. It is necessary to the validity of a policy that the insured have an interest in the life, at the time of making the policy; & also to make the insurer liable at the happening of the lots.

2 Atk 55.

2 Vez 963

The dangers usually insured agst are the perils of the sea, the enemies of the land, pirates & barratry of the master.

3 Bos & P 35
Burr 1183

Fraud or even a shadow of fraud is sufficient to entirely vitiate a policy.

If insurers run no risque they cannot retain, even tho the conduct of the insured prevented the risque; & therefore the premium paid on a policy must be refunded.

Bur. 1351

A policy is made void for the misconduct of the insured, of the master, if the barratry of the Master is not insured against, as well as by fraud. The misconduct of a pilot, or any change of the voyage dispenses the insurers. But if there be an intention to change the voyage, & a loss happen before the ship has left her course mentioned in the policy, the insurers are liable.

1 Show. 324. If an insurance be made on a ship, which is absent in a voyage, the insurers are not liable for any loss, which may have happened, previous to such insurance. But if, as is often done, the clause "lost or not lost" be inserted in the policy the insurers are liable for a previous loss.

1 Show 133 The several subscribers to a policy each in case of total loss, liable to the extent of his subscriptions are void & upon such subscriptions, the premiums must be refunded. This is in my opinion non sense. The principle decided in 1 Show 133. was that if there be a number of subscribers to a policy, & the policy is an open policy; in case of a loss, each one shall contribute to the amount of his subscription till the loss is made up to the insured; & if there is any more money subscribed than the amount of the loss or less the premium paid money shall be refunded & none of the subscribers to the policy made liable, after the sum subscribed equals the loss which may have happened & the premiums in their hands is to be returned. And after the sum subscribed amounts to the loss a third person happened none of the other subscribers shall be made liable, altho some of the subscribers to the first sum have become insolvent. 1 Show. 133 The Court in gave the liability of all the subscribing insurers.

Policies of Insurance

Insurers of a ship "at & from a port" of the ship arrive at the port are liable while
2 Atk 857 she lies at the port preparing for the voyage; but if it appear, that the intention ~~to begin~~ prosecute the voyage is relinquished, the insurers are not liable. If a ship be insured at &
Park 1251 from a port, & be lost before her cargo is put on board, nothing can be recovered out of the insurance for the freight of the voyage. Otherwise if the cargo be on board.

The insured for so much money
2 Vern. 717 on such a ship need not prove that he had such a sum in specie on board, if he had
3 Bur. 1894 an interest in the ship to that amount, & not in course of the freight, or merchandize on board the ship.

The loss has in all instances,
Park 1065 been considered as total when the salvage did not amount to the freight.

A capture by an enemy is a total loss. To this there are exceptions; as if the ship be immediately retakenen, or if the
2 Bur. 683 1198 ship escape from the captors, or if retaken & carried to the port of her destination. If a

3 Atk 195 total loss might have been prevented, but was not, the insured may recover for a total loss. It seems if a ship is captured & prevented

Park. 282 from prosecuting her voyage the capture is

1 Wils. 191 a total loss.

A declaration for a total loss is

2 Bur. 964 good, tho the loss turn out an average one is good.

"To sail with convoy" & "to depart with convoy", have been construed to mean the

Park. 72 same thing, & to mean a continuance with convoy the whole voyage.

When the policy is, that the

1 Mod. 80 ship sail with convoy, if she sail not with convoy the insurers are discharged. If she depart

Shep 326 with with convoy & voluntarily abandon it, the insurers are discharged & the premium must be repaid.

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Only part of the risque which is

Cowp 568 insured against, & for which a premium is taken is actually run, a part of the premium, according to some adjudications, must be restored according to others the whole may be retained. Mr Reeves finds no rule expressly

laid down, to distinguish the cases in which there must be a partial restitution, from those cases in which the whole premium may be returned. From the cases, however, he think the rule to be, that if, the risque being begun, the insured by some voluntary act, discharges the insurer from further risque; as by voluntarily abandoning the convoy, or by returning into port, after having proceeded a part of the way on the voyage & relinquishing the voyage, the whole premium may be returned; that is, if the insurers are discharged from further risque by some accident & not by the act of the insured.

Park 1237

If a ship warranted to sail with convoy, is unfortunately separated from the convoy, the insurers are liable.

Park 291
Stra 1250
Salk 443

If a loss happens before a departure from a convoy, or a deviation from the voyage, a previous intention to deviate, or even actual subsequent deviation does not discharge the insurer from such loss.

Salk 444
Park 665
Park 16

An insurance "till the ship is discharged;" is indeed when the goods are put on board lighters sent by the owners to receive them; but not when put on board the ship's boat to be landed

Kang 123

Insurance against the perils of the sea extend as well to all mediate as well as immediate losses by storm. If a ship should be disabled in a storm in consequence of which she is afterwards captured. The insurers are in this case liable for a total loss.

The constructions which have been given to an insurance against pirates, robbers & thieves is such as to make the words "thieves" mean nothing

Insurance against the restraint of Princes is not confined ~~[illegible]~~ to an insurance against seizures for the violation of the revenue or other laws of the nation

Barratry includes only fraudulent conduct; & not the negligence of the master.

Kang 126 & 175

Policies of Insurance

A rule is said to obtain in the law merchant conformably to the principles of the com. law, that parol testimony may be admitted to contravene written evidence. This rule of the mercantile law has not been strictly adhered by the Eng. Cts. Mr R thinks it questionable, whether the Eng. Cts. will ever deviate from the rule of the com. law in this particular. If however a policy agree not with the label, which is a memorandum of the contract, entered at the time of making it in the books of the insurers. The policy is to be governed according to the label.

Salk. 444

Stev. 55

1 Atk. 545

Marsh. 304

1 Burr. 541

Bankruptcy of the insurer, his removal into a foreign country, & by an Eng. St., by his death are causes for which an insurance may be made void.

Whether in case of removal, or death, the first insurer, or his Ex. is discharged or not, by a re-insurance. Mr R knows of no cases which determine it.

vide. post.

Of Charter Parties

A Charter Party is when one hires a Ship for the transportation of goods. The right of the owner to recover against the hirer on this species of contract, depends upon the existence of the Ship; for if the Ship be lost no freight can be recovered. In certain cases a part of the freight is recovered.

1 Vil. 286

Freight becomes due at the port of delivery, unless otherwise agreed by the parties. When the freight of the outward bound voyage becomes due at the first port of delivery, the claim of the owner to the hirer is not defeated by the loss of the Ship on the homeward bound voyage. But any freight not due previous to the loss of the Ship cannot be recovered.

2 Term. 212

Freighters of Ships under charter parties with the East India company (& probably with all other persons) are not answerable for damages occasioned by acts of God.

Dougl. 272

If the merchandize are damaged, or are partly lost, the merchant may always abandon and discharge himself of freight; but if he abandons at all, he must abandon the whole, & cannot abandon a part. If the Ship is captured & again retaken; or if she otherwise be prevented, without the fault of the master, from reaching the place of delivery, freight must be paid according to the portion of the voyage performed before the capture, or hapening of the other event or any other event. So if a part of the cargo is lost freight must be paid for such part as is saved.

2 Bur. 882

If there be fault in the master in consequence of which loss happens, he is liable in manner the same manner, as he would be at com law for negligence or misconduct.

The law merchant compells a specific performance of no contract.

Where in a mercantile contract earnest is given, the money given, as earnest, is forfeited, if the party giving the earnest, retracts from the bargain; & if the other party retracts, he forfeits double the sum given in earnest.

The master has a lien upon the goods for the freight & may retain them till it is paid.

It is a gen. rule that the owners are liable when the master is. If, however, the Ship is not employed in the carrying business, & is on a voyage for another purpose, the master alone is liable, if he take on board goods & loss happen upon them.

Hardr. 85. 144

By a Act of 7. G. 2. Chap. 15. owners are made liable for the embezzlement of master & mariners to the extent only of the value of the Ship & the freight of the voyage.

The Ship owners & master are all liable each & every one of them for the contracts of the master for repairs of the Ship, or for other use of the Ship. From such contracts the owners can by no possibility disencumber themselves. If they have no interest in the Ship, having lapsed then to several years, still they are liable. The master has power to hypothecate for money to be laid out for her use.

Labek. 252

Bottomry is when one lends money to the owner of a Ship to be paid with a certain premium, if the Ship returns from her voyage. If there be a deviation from her voyage, the borrower is liable on his bottomry bond, tho the Ship does not return.

2 Vern. 643

Master & Owners

In case of many owners a majority gov-
1 Mau: 13. erns. If a majority of the owners send a ship
on a voyage, the majority are liable to the
dissenting owners for their share of the prof-
its, & it is at their hazard. It is usual for
the major part agreeing to the voyage, to
suggest, in the Ct of Admiralty, the disagree-
ment of their partners; upon which an
appraisement of the Ship is ordered, & the
major part who agree to the voyage, enter
into a recognizance in which they bind
Anth. 27 themselves, jointly & severally to their dis-
agreeing partners in a sum proportionate
to the shares of they respectively own in
the Ship.

The master is not liable for
debts contracted by himself, for the use
Flinder. 376 of the ship, when the contract was actual-
ly made on the sole credit of the owners.

Mariners are entitle to no
wages if the ship is lost. If they leave
1 Ab. 179 the ship before her cargo is discharged, her
tackle taken down & stowed away &c their
wages are forfeite.

Mariners are obliged
to carry the goods & merchandize from on board
the Ship to the place where they are to be
discharged or deposed of. In this service
they are particularly paid.

Mariners Wages

The mariners wages are due at the port of delivery; & any contract made by them to the contrary does not bind them to waive their demand.

2 Vern. 728

A principal is bound by the acts of his factor. Goods sold by the factor become the absolute property of the vendee. But if the factor pawn goods for his own debt, the principal

Strange 1178

A factor acting within his commission is not chargeable with any loss. Otherwise if he act out of his commission.

If the principal become a bankrupt, the factor may retain goods in his own hands to satisfy a debt due to him from his principal.

Of Real Estate

All property which descends to the heirs, is real estate; & that which goes to the Exr is personal estate.

The heir has both the legal & beneficial estate in that which he takes; the Exr only legal & is trustee for others.

No lien is upon the estate of the ancestor such as the ancestor has expressly charged upon it, the estate which the Exr takes is liable for all the debts of the ancestor

By our law as by the Eng law real estate descends to the heir; but on failure of personal estate to satisfy the debts of the deceased, the real estate becomes liable to satisfy debt of any description.

Real estate is divided into corporeal & incorporeal hereditaments. The former may be comprehended under the term lands; which term includes houses & every species of building erected upon the land; the water which covers the land, trees herbage & whatever grows upon it is attached to the land.

A real estate in lands is either a fee simple, a fee tail, or an estate for life; the latter of which is not an estate descendible to the heir.

A fee simple is an absolute & complete title in land & may be disposed of at the pleasure of the proprietor. To create this estate the deed must originally contain both words of inheritance & perpetuity. Words of perpetuity have been long since dispensed with; the word "heirs" is a technical term, the place of which, in the conveyance of an estate in fee simple no other word or words can supply. In Devises, which were first known to the Eng laws in the reign of Henry 8th, any other word or words which shew the intention of the devisor to make an estate in fee simple, would supply the place of the word "heirs". It has been held, however, that a gift in a will of a "farm of land", mentioning where it lies & its bounds, gives only an estate for life, & not a fee simple.

Real Estates

It is a rule in the construction of a will, that the intention of the testator is to be pursued, so far as it is consistent with the rules of law. The rules of law with which the intention of the testator may not be consistent are not such as relate to the particular words, necessary in a deed to make an estate; but such as relate to the kind of estate created.

An estate tail is such an estate, as descends to the heirs of the body of him who has such estate, & not to his heirs generally. To make this estate "heirs of the body" are in a deed indispensible words. In the construction of Devises, the same liberality obtains relative to estates in tail as in estates in fee. In Eng. an entailment is barred & the estate becomes an estate in fee by a fine & recovery. adopted by the tenant in tail. In C. as P. with the fee in the immediate reversion of the first Donee.

Heirs & heirs of the body are words of limitation unless used in a case so circumstanced, as that the intention of the person, who used them, appears to have been, that they should be taken a words of purchase being description of the person.

If there be a devise to one & his heirs & the devisee dies in the life time of the devisor, the heirs of the devisee take nothing by their will

6 Mod. 248

A devise to one for life & after his death to his heirs gives the first devisee an estate in fee; & a devise to one for life & after his death to the heirs of his body, gives to the first devisee an estate in tail. The rule laid down is, that if, in the same instrument of conveyance, an estate is given to one & his heirs, such donee takes an estate in fee; & if to one & the heirs of his body an estate in tail.

1 Co. Rep. 98

4 Burr. 2597
Pool on Devises
351. 368
1 Co. R. 85.
Other opinion.
opposed on
L. Hardwicke
& Mansfield &
Lord Lewis in 4 B.

It is held by one party that if, in either a deed or will, any other words than the technical ones "to one for life & after his death to his heirs, to to one for life & after his death to the heirs of his body" are used as indicative of the donors intention, that the first donee should take no more than an estate for life & be a life estate in tail.

1 Co. R. 95.

On another party this doctrine is controverted. The rule in Shelleys Case (1 Co. R. 95) is recognized by both parties to be unquestionable law; & both parties likewise acknowledge that the word heirs or the words heirs of the body may be taken as words of purchase for the intention of the donor. But one party contends, that these words can be taken as words of purchase only when descriptive of a certain person which the other maintains that they may be taken as words of purchase when no description of no certain person, but of certain characters as the heirs of G. L. shown that might happen to be. The law on this point seems to be considered as totally unsettled, there being about the same weight of authority on the one side as on the other. See the cases in the margin in which there is great contradiction

1 Ch. R. 112
Co. Eliz. 318
2 Bac. 203
1 Eq. Ca. Ab. Case of Duke Rho. p. 184
2 Vent 231
1 Ves. 142
2 Burr 1000
1 Vent 225
2 Atk 267
2 Burr 1103
1 Atk 112
L. Bray 1437
4 Burr. 2597
10 Ves. 87-142
2 P. Wm. 471-

Sec. upon this question collection

In all instances an estate to one for life & to the heirs of his body, given in a marriage settlement, the first taker has an estate for life & his issue are bounds in tail. Mr Preston sees no reason for distinguishing marriage settlements from every others.

1 P. Wms. 112. 123. 612
2 P. Wms. 319

Words which in a grant of real estate convey an estate tail, in a grant of personal estate give the first taker an absolute estate. But personal estate may be given to one for life & after his death to another. The second taker, however, takes the property absolutely, it can be no farther limited.

8 P. Wms. 258
2 Ves. 280. 616.
2 Atk. 89. 276. 312.

Distinction, tho no such rules exists between an estate tail in personal property, given by express words, & one by implication. In the former case the first donee takes an absolute estate, in the latter an estate for life only.

1 P. Wms. 665

In C. under the. 4 giving a fee to the heirs of the first taker has an entailment, the reason assigned by Eng lawyers

way, in regards of personal property, words giving an estate tail should give the first taker an absolute estate, except be a gift. Whether in C. a gift in tail of a chattel interest, given the first taker mere tenant for life may be questioned.

Devise to the heirs of A. now living gives an estate to the heirs apparent of A.

Co Litt 330

In a Devise the words "all my estate" give, tho it was formerly contended a fee simple, if the donor had such an estate in the lands devised. Vide cases in margin.

2 Wms. 418
Cowp. 306
Doug. 750
2 Vez. 614
2 Atk. 38. 2 Ver. 52
1 Dun. 42. 2 Dun. 657

It has been said that a devise of all my estate in A. bounded North &c describing the lands particularly, did not make an estate in fee.

1 Bac in Abr

"All my effects" at law has been adjudged gives all the interest of the donor whether a fee or other interest.

Cowp 299

A Devise of all my house & lands has in no case been adjudged to make an estate in fee simple in the Donee.

Doug. 73

The term heirs is ade & insertion in a bond under the statute of 8.

Co. Litt. 590
Co. Litt. 18

In a grant by a deed a fee cannot be mainteined on a fee; but a fee after a fee is good in a Devise. The contingency, however, upon which the fee is to determine, & the second becomes vested, must happen within a life or lives in being & twenty one years after; if it be possible, that the contingency should not happen within this period the devise over is void, & the first devisee takes an absolute estate.

If a Devise be to one & his heirs, & if he die without issue, to another & his heirs, it is such a devise as will give the estate to the latter upon the contingency of the former dying without issue; provided the devise be such as shows that "dying without issue" means "without issue at the death of the first Devisee.

In England an estate pur autre vie, descended to heirs, leaving no heirs, the land reverts to the Lord of the manor in which the land are; in Ohio goes to the State

Real Estates

A fee tail estate is one which goes to the heirs of the body generally, or to heirs of a body of a particular description. This estate determines upon the failure of such issue of the body to the estate is limited to; & when it determined it reverts to him or his heirs, who, having the fee, granted the estate tail. This reversion, as well as the interest of the heir of the tenant in tail, may be defeated by a recovery suffered by a tenant in tail.

Co. Lit. 19.

Formerly there were two estates, a fee simple, & a fee simple conditional. The latter was an estate given by the same words which now make an estate tail. An estate to one & the heirs of his body was held to be an absolute estate in fee, upon condition that the donee had issue.

Co. Lit. 27.
Co. Eliz. 478.

An estate to one & his heirs made a formal & an estate in fee, and descended to his heirs generally.

1 Wilson 268
1 Rol. 838
Co. Lit. 21

If the donor not mentioned or manifest his intention to give an estate tail such estate shall be taken.

If a devise be to a husband & wife & to the heirs of the body of one of them, that one, the heirs of whose body are to inherit, is the tenant in tail.

C. Jac. 175

The rules of descent of an estate tail among those who may by possibility inherit, are the same as those which govern a fee simple estate; & are that the eldest son takes in exclusion of the younger &c.

It has been questioned in C. whether an estate in tail male or female should not, on the death of the first donee, descend to all his children both male and female. Mr Cruise thinks that upon legal principles, it would descend to the males or females only, according as it had been limited to the one or the other.

It has been contended in Eng. that females, who are not heirs of the body, are not tenant in tail, cannot take under a gift to such tenant & the heirs female of his body. It is now settled that such females can take as heirs of the intailed estate, notwithstanding there be male issue. But one cannot take as female heir, by the general description of heir, who is not heir, unless the term heir female has been used as descriptio personæ.

Co Litt. 24.
Hob. 31
1 Vent 381

Co. Lit. 25 — Son, who takes as heir male a female,
2 Tum. 409 — must claim his title as descent thro a person of his own sex.

The Widow is endowed out of an estate tail.

Of life estates there are two kinds created by act of law & those created by act of parties. An estate for life is a freehold estate; & any estate for an uncertain period, which may last for life is a life estate. If the duration of the estate is limited to any given number of years, beyond which it cannot last it is a chattel interest.

The first species of life estate created by law is that of tenant in tail after possibility of issue extinct. This has been called tenant in tail special, & the person from whose bodies, the issue was to spring dies without issue. This has all the properties of a life estate, except, that the tenant ~~in tail~~ is not liable for waste.

Co. Lit. 28.

L. Raym. 58.

The second kind of life estate, created by the law is an estate of tenancy by the curtesy, which is the interest a husband has in the real estate of his wife after her death. It is an estate for the life of the husband in the real estate of the wife. By this estate every husband is entitled, who has issue by the wife, born alive & capable of inheriting in the real estate. But the husband is not entitled to the curtesy in any estate of which the wife had actual possession. In this State, the right of possession is considered as actual possession, & of course the husband has the curtesy of property of which the husband or the wife had the right of possession.

By the Eng law the husband has an estate for his life; in this State there has been, a considerable time since, a decision that, that the children of the wife shall take the estate at their age of majority. This is, not, however, to be considered as settled law in this State.

Co. Lit. 29

Real Estates

The Courtesy of Gavelkind does not ex-
ist here, which is very different from
the other estates in the kingdom. As lands
in C. were originally given to be held on the
land in Kent were held, which were Gav-
elkind lands, it is questionable whether
the courtesy in C is not that of Gavelkind.
The practice has not been to consider it so, &
the practice having been long & uninterrupted
would not be easily altered.

3 P. Wms. 229 — The husband has a courtesy in a trust estate.

1 Atk. 608. — There is no courtesy of an estate of a trust
the wife is mortgagee.

3. Atk. 615 — The husband has not a cour-
1 Ves. — tesy of an estate given to the separate
use of the wife.

Dower is a third species of legal
life estate. This is by the Eng. law vested
to the wife for her life, of one third of all
the real estate of which her husband was
seized, at any time during the coverture,
which the wife could have spun to inherit.
The wife may be endowed out of estate, of
which the husband had only the right of
possession, without ever having had
possession.

The husband by no act of his bar the wife of Dower.

Co. Lit. 31. By St. of C. the wife can claim dower of such estate only as the husband died possessed. If the husband in contemplation of death convey away ~~their~~ his estates by deed for the purpose of barring the wife's right of dower; the Cts have considered such conveyance by deed, or testamentary disposition void as against the wife's right of dower & have endowed her.

Not of an estate of a trust the husband is no more than trustee, & has the legal interest only. The wife can claim no dower

The wife of the cestique use is not endowed.

The survivor of joint tenants has the whole estate by survivorship in exclusion of the deceased tenants wife of dower. In C. the jus accrescendi does not exist.

By St. of Henry 8. a jointure may be made in bar of the right of dower

Co. Lit. 36 This jointure may be previous to marriage or subsequent. If, however, it be made subsequent to the marriage the wife is at her liberty to accept it or take her dower

1. Rep. 1. In C. there is a St. recognizing the Eng law of jointure in lieu of dower

Real Estates

Nothing can be taken as a jointure in bar of dower, which not expressly declared to be such. A jointure to be effectual in bar of right of dower must give the wife an estate for life, at least must vest in her immediately after the death of the husband & must be competent for her support.

It is common that in wills the testator gives to his wife one third of his real estate for her support during life. Upon this the question has been whether the wife shall take this third devised & her dower also. Adhering to the rule "that the testators intentions to govern" there can in most cases be little doubt that the third mentioned in the will is intended for dower.

The reversion in fee may also be vested in the tenant in tail, & both remain distinct in law. This is the case when an estate is given to one & the heirs of his body to have & to hold for himself & their forever.

Co. Lit. 21.

The grantee in fee of a tenant in tail is not a purchaser of the land nor after the death of the tenant in tail; & the heir has not a right to enter on such grantee.

Co. Lit. 327

3. Co. 6 Ap. 85.

It has been questioned in C. whether personal property might not be given by jointure in lieu of dower. This question has arisen upon a loose expression in the Act which we do not think the legislature intended should carry a meaning different from the Eng. law.

Elopement, willful absence from the husband, & living in a state of adultery with another will bar a right of dower. We are of opinion that an act ought to be construed the same as the Eng. laws, tho. the words are not fully explicit to that purpose.

Only the husband's wife shall be endowed, notwithstanding a divorce the being the innocent party.

A conventional estate for life, in distinction from a legal life estate is either, clear or, leaving a sufficient interest, granted to another mortal for the life of himself, or of some other person or persons. If the grantor have the fee, & grant an estate for life generally, without specifying the life of the life it shall be taken for the life of the grantee, but if the grantor have only an estate for his own life, or if he be tenant in tail or tenant for his own life, it shall be taken for the life of the grantor.

20. Lit. 42

Tenant for life has not a right to the trees growing on the land, except for certain uses, which are called estovers. In waste for cutting down timber or otherwise the tenant is liable for damages; & if the waste be voluntary the estate is forfeited.

If an estate for a term of life or estate was made, without the tenant, such estate, the remainder at common law was given to the first occupant. In deeds it provides in what manner it shall be disposed of; in b. it remains as at common law. If however there are any words in the grant pointing out in what manner the estate remains shall be disposed of, it shall go accordingly.

3 Co. Litt. 262

All interest in land, not a fee simple, or fee tail or an estate for life is a chattel interest.

If the duration of an estate is certain or may be rendered certain by calculation, it is an estate for years, however long the period for its existence may be.

Real Estates

in by leases for a term not exceeding three years may be made by parol. In l. all parol leases are void. If the lease is by parol no rent can be reserved unless the tenant enters & enjoys; under a lease for
5 Co. Rep. 55 vesting an enjoyment is not necessary to entitle the lessor to rent.

A lease for life or 21 years is good for 7 years at least. It has been
2 Ban 1023 contended that such lease is void for uncertainty.

Tenant for years has a right to estovers, in the same manner as a tenant for life.

# of Estates at Will

One who enters upon the lands of another, with his permission, without contracting for the enjoyment for any length of time has an estate at will. This estate is determinable at the will of either party. The right of the lessee to enjoy, till the lessor signifies his will to the contrary is called an estate at will; but it is not any thing which he can transfer or that can descend to his executors, because it always determines on the death of the lessee.

This estate is determined by an express declaration of the lessor, or by any act which is incompatible with the enjoyment of the tenant at will. But if the lessor act in such manner as indicates his intention to terminate the lessee's estate as to part only, he may continue in possession of the rest.

If the lessor determines the estate, the lessee retains a right, ingress egress and regress for the purpose of removing off his family & goods; & for the purpose of cultivating & gathering & carrying away the crops growing at the determination of the estate. But any act not for one of these purposes mentioned, done after the estate is determined the lessee becomes a trespasser. If the lessee determines the estate, he may enter for any other purpose but to remove his family & goods.

The lessee may determine his estate by abandonment, or by any act which he has not a right to do as tenant at will. Any act on a tenant at will, which would be waste in tenant for years is a trespass.

If tenant at will continues to occupy from year to year, he must pay the rent agreed upon at the end of each year. If the lessor determines the estate before the end of the year, the tenant is obliged by the contract to pay nothing but such rent must be paid as upon a consideration of all the circumstances is an equitable one. The same is the case when the estate is determined by the lessee.

Estates at Will

The possession of tenant at will is good against all persons, except the lessor, & he may maintain trespass against any other for disturbance of his enjoyment; and also against the lessor himself for any injury done to the emblements.

An estate at sufferance is the same as an estate at will except that the former is by an implied contract & the lyan express contract. This estate is had by a tenant for years, who by the silent permission of the owner continues to hold, in possession after his term has expired. And when one thus holds over he is considered as holding on the same terms which he held under by the lease for years.

Emblements are sometimes considered as real & sometimes as personal property. Between the grantor & grantee they are always real property, & go with the land, unless specifically excepted in the grant. So as to its being felony to take them away. No felony can be committed upon real estate, but it is no felony to take them & carry them off. The severance of any thing growing upon land changes it into personal property, & then to steal it is felony

Emblements are personal estate as to creditors & Executors. They go to the Ex. & not to the Heir; & may be taken by the creditor as any other estate.

As the determination of uncertain emblements sometimes go to the owners of the land & sometimes to the tenant lett in possession or his Exr. The rule is that if the tenant determines the estate by his own act, or if he could foresee the determination of the estate, as where he is tenant for years, he shall not have the emblements. But it must be the act of the tenant, from whose act determines the estate or the emblements shall not be forfeited. Where for if the lessor alienes, & does such an act as grants an end to the estate, the alienee of the lessor shall have the emblements.

Of Incorporeal Hereditaments

Of Incorporeal estates some are real & others personal. They are estates in fee, in tail, in fee or years. In, C. there are few of this species of estates.

Possession which are a very common & important estate in Eng are here unknown.

Something of the nature of common exists in some parts of this country. It is an estate which descends to the heirs & is capable of being bought & sold.

Lib. 1. c. 1. Lib. 237

If one sell to another a mill water, the vendee takes an incorporeal estate, that is, a right to use the water for filling & other purposes, but the land covered by the water does not pass.

A right of way is another species of hereditaments. It is sometimes a right annexed to the person, & then it determines with his life, & is not transmissible from one person to another. It is often appurtenant to a house or farm of land; in which case it always goes with the land, cannot be retained, or conveyed away but with the land.

Co. Lit. 56

If one sells a piece of land, to which the vendor has no way, but thro the land of the other, a right of way is taken to be granted thro the other land with the land sold. But when one buried an execution on a piece of land in the middle of his other land or farm, he was adjudged to have no right of way on he would have been in case of a purchaser of the same land.

Co. Jac.

An annuity is real property, tho a singular kind of real estate. Wm. R. doubts whether in this State Annuities would be considered as real estate.

If a tenant in fee or any other freehold estate convey his estate reserving an annual rent, such rent is real estate & descends to the heir as the land itself would have done. The rent descends with the reversion tho a distinct estate from the reversion. The rent may be granted to another. By a grant of the rent simply the land do not pass, nor the reversion; but by a grant of the rent the reversion passes unless expressly reserved.

Incorporeal Hereditaments

The privilege of streams of water is an incorporeal hereditament. It may be owned by one who is the landowner which it flows in the property of another. It is an estate which descends to the heir & not to the executor.

Of Mortgaged Estates.

An estate in fee simple may be made liable to be defeated by or upon contingency. This is the ground of Mortgages.

Mortgages are introduced to secure creditors, by conveying to them real estate of their debtors to one person a sum the debt contracted. By this species of conveyance, which is merely pledging real property for the payment of a debt, the creditor secures himself from all danger of loss, at the same time that the Debtor has it in his power to save himself from all engagements by payment of the money due with the interest.

The mode of this conveyance is for the debtor conveying to creditor an absolute estate in the Mortgagee, with a condition annexed to it, that on the payment of such a sum of money, which is the debt & interest, if the debt is on interest, by the time therein specified, such deed shall be void.

Sills v. Waterfall

It has been a question in whom the title of the land is in the intermediate time of making the mortgage, & the happening of the contingency which is make void the deed. It is now agreed that the title to the land rests immediately in the mortgagee, but is defeasible.

At law the contract has effect between the parties, according to the tenor of their agreement; & if the time prescribed in the condition has elapsed without payment, the deed becomes absolute & the mortgagor is without remedy at law to recover his land. But the hardship to which this often subjects the debtor induced the interposition of equity to give the mortgagor an opportunity to redeem, notwithstanding any lapse of time, however long. It is the practice of Courts of Equity on application to limit a time, in which the debts & interest shall be paid or the right of redemption be forever foreclosed. This right of the Mortgagor to redeem is called the equity of redemption. It is incidental to mortgaged estates; & the parties have it not in their power to make by any contract, a mortgage in which their right to redeem does not remain to the mortgagor.

The estate of the mortgagee is, in fact, no more than nominally real property. On the decease of the mortgagor, the land descends to the heir, but he is only trustee for the executor. If the mortgagor redeem & pay the money to the heir, he must pay it over to the executor. If the heir foreclose the equity of redemption, he must convey the lands to the executor. He may himself foreclose.

The mortgagor usually continues in possession. He is not accountable to the mortgagee for the rents & profits. It is sufficient for the mortgagee that his debt is an interest. The mortgagee may at any time eject the mortgagor. The equity of redemption can never be effected by an ejectment. The debt of the mortgagee continues an interest after he goes into possession as before, but he must account to the mortgagor for the rents & profits. The surplus of the rents & profits after paying the interest will be applied to sink the principal sum. But if the rents and profits second by the mortgagee amount to more than the debt & interest it seems that he will not have the surplus to be paid over to the mortgagor. Which does not strike this absolutely settled.

Estates Mortgaged

The mortgagor who is in possession is a tenant at will. But the mortgagor when turned out of possession, is not as other tenants at will, entitled to the emblements. In this there is no wrong to the mortgagor the emblements being applied for his benefit in discharging the principal and interest of his debt.

The mortgagor has the sole right of redemption. But if he neglects to redeem within a reasonable time, any person interested may redeem the equity of the mortgagor may redeem; & the debt of the redeeming creditor, & the money paid in redemption are both chargeable on the land.

If there are a first, second &c mortgagees the title is in the first only. If the first mortgagee is paid off, (which may be done by a second &c) the title immediately vests in the second &c.

If a mortgagee in possession makes an under tenant, such tenant, after goes into possession, is a trespasser not at the election of the mortgagee

If a second mortgagee pays off a mortgage, prior to his, after the time, after the time prescribed has elapsed as in the condition, no title vests in him; but the Ct will compel the 1st mortgagee to convey to him the 2d mortgage.

The Ct, it is said, in giving the mortgr opportunity to redeem, after the day fixed by the parties, beyond which there should be no right of redemption, has departed, & pursuit the right of altering contracts. This is opposed to a settled rule of law, that Cts cannot alter or change a contract, so as to give it an effect different from what the parties intended. In support of the opinion that Cts, in the case of mortgages, act in violation of this rule, it is said that a Ct of law could not give this right of redemption to the mortgagor. But Mr R. supposes that Cts of law might have relieved in this for the same reason that they have relieved in many cases.

A mortgage M. R. considers in the same light, as a bond with a penalty. If the money is not paid according to the condition of the mortgage, the land

Wells v. Montgomery

becomes forfeited in the same manner as the penalty of a bond is forfeited if the condition is not performed. The ground on which relief is given agst the penalty of such bond, Mr. R. thinks to be, that they are agst sound policy; being of ill consequence as tending to encourage the negligent, the ignorant & improvident, as well as to oppress such as are in embarrassed circumstances, & therefore void if Ots see fit to treat them as such. And void in their own nature the obligor cannot complain if Ots give them effect so far as in equity & good conscience they ought to have effect, since this is all in his favour; provided they go no further. Nor is the obligor injured by being bound to that which in equity he ought to perform. On the same ground Mr. R. is of opinion on the 7 instances in case of a mortgage compelling the mortgagor to do justice by payment of debt & interest, of the well founded benefit of the assistance of the Ots to elude agst a contract to which he is bound at law, tho Ots may consider the contract void. In this view of the subject, Mr. R. thinks that the proceedings of the 7, with respect to mortgages, are not a violation of the rule, that Ots may not alter contracts, & make them different from the original intention of the parties.

The uses raised which was formerly in use are now no longer exists.

The first kind of mortgage, that now in common use is, when the mortgagor makes a deed conveying an estate to the mortgagee & his heirs, adding thereto a condition that if a sum of money, which is the debt be paid with interest within a time limited the deed shall be void. This condition may or may not be on the same piece of paper, & between the mortgagor & mortgagee it is in all respects the same in both cases. But if the condition is separate from the deed & the mortgagee assigns the deed for an absolute debt, as it pretends to be, the mortgagor has no remedy against the assignee, but they will draw an assignment conveyance by the assignee of mortgagee; & as it is not in his power to convey a penalty will be set upon him.

Co. Lit. 205

A second mode of making mortgaging mortgages is by deed assuring to the mortgagee a right of entry upon a certain contingency.

Co. Lit. 211

Mortgages

As the widow of the mortgagee in the above kind of mortgages might claim her dower, if the mortgagee died before redemption, another mode of mortgaging came into use, which was for the borrower of the money to make to the lender a lease for a term of years, & immediately on the next day, take back a lease of the same lands for a term, say 99 years if the former was for an hundred, to be void if the money borrowed was not paid with the interest thereon within a specified time. It has to be remark that in the former kind or mode of mortgaging the widow could not be endowed if the money was paid before a breach of condition.

Another mode is by making a lease for a term of years, to be void on payment of a debt & interest within the time specified.

In all cases, except the one of making a lease & taking another of the same land back for a less term, where the title is in the mortgagee till the day of payment; the title is in the mortgr.

Payment of the debt with interest a tender of payment divests the title of the mortgagee. The mortgagor having the indenture of the title on himself, the deed & w. that deed upon a public record. The mortgagee to get his title upon record, if the mortgagee will not accept & is in possession, may sue him in ejectment, & proving payment he is able to prevail. If the mortgagee is in possession & the mortgagee brings an action to eject him, he may prove payment of the mortgage money which will defeat the action. If the mortgagee is in possession & the mortgagee does not disturb him, but will not accept, he may be sure seeing after the death of the testator on a bill for defendants to prove the payment a tender, & pay in the money for a receipt from the mortgagee.

If the mortgagee is a bankrupt so that the penalty at the expiring to receive money is incurred, that will prove a double quieting the mortgagee in his possession. The right of the [illegible] has been questioned, considering it as a dangerous power, arbitrarily taking away the title of one & giving it to another. But Mr. Brooks

Ex. in 11 Jac. 1 Ser. 361 1 Vern. 575

or no greater, nor a more dangerous power to quit the mortg^r in his possession in case of bankruptcy of the mortg^ee than in other cases to set such a penalty as to compel the mortgee to surrender; & if the law ought to set a penalty to compel such a thing to be done, when that fails of effect, then ought the same reason for inflicting other means to do justice.

"Once a mortgage always a mortgage" is a maxim of the law. According to this maxim any contract of the parties to defeat the redemption of a mortgage, with a design to invest the estate & right of the mortg^or hereafter is fraudulent & void. It has been attempted, but without effect, to avoid this maxim by making upon the payment of a further sum. It has been said that once a mortgage always a mortgage between the mortg^r & mortg^ee, but it may be otherwise between one creditor who redeems & another creditor, but the C^t did not recognise the distinction.

2 Atk 495

1 Ven. 192

1 Ven. 188

1 Ven 188

Co. Lit. 207
2 Rep. 77

The debt remains after tender & refusal as in other cases of tender & refusal. To this rule there is this exception. If the consideration of the mortgage was not a prior debt, merely gratuitous, the mortgr after tender & refusal of the mortgage money, has no claim to the land & money

1 Vern. 268
15 Vin. Ab. 468.
1 Bro. C. Ca. 164

To the maxim "once a mortgage always a mortgage" there are some exceptions. If one having made a prior mortgage, borrows a second sum of money of the mortgagee, & makes a second mortgage of the same land, the condition of which 2d mortgage is, that if the money of the first mortgage & of the second be not paid by the day, the deed shall be absolute, there can be no redemption after breach of condition.

1 Vern. 198.
2 Vent. 365.
Hard. 511.

If the mortgr intends by mortgaging a mortgaged estate irredeemable upon condition or contingency, a gratuity or benefit to the mortgr, the right of redemption is at an end upon the happening of the contingent event.

Fraud Mortgaged

In this country it is a litigated point whether there can be a fraud mortgage. The objection to a fraud mortgage are that fraud testimony cannot be admitted to vary a deed, & that such a mortgage is void under the St of frauds & perjuries.

It is not questioned that if the cont. be for a mortgage, but by mistake of the scrivener an absolute deed is drawn, parol testimony may be admitted to prove that it was intended as a mortgage. It is agreed that witnesses cannot be admitted to testify directly to a parol contract between the parties, that the deed thus purporting to be absolute, should yet be considered as a mortgage.

3 Ath. 389.

It is the opinion of Mr R. that an agreement between the parties, that a deed purporting to be an absolute deed, shall be considered as a mortgage by proof of facts that show beyond a doubt that it was intended for a mortgage

Per in. Ch. p. 526

Pos. on. Mort. 6

Salk 61 Tun. Ath.

It is said that parol testimony is not admissible to destroy directly but to show a debt discharged, it is admissible so collaterally to defeat a mortgage title, which depends upon a debt.

Barnard Ch 9 qa

There are different opinions as to the interest of the mortgagor in the lands before a breach of the condition, by non payment at the day. It is said that he is tenant at will, notwithstanding the agreement of the mortgagor that he shall continue in possession. This opinion Mr. L. thinks objectionable. It is an agreement which Equity will enforce; & it is said by L. Hardwicke that a Court of Law ought not to decide against such an agreement, & leave the party to apply in a Court of Equity who will compel a breach of a court of law, if done. Mr. L. thinks that the mortg. is in the nature of lessee for the term.

Cro. Jac. 659

It is now a point litigated in an ejectment, whether if a mortgagor be left in possession, the mortgagee can turn him out before the law day expires

Chattels Mortgaged

After condition broken by non payment at the day, the mortgagor is no more than tenant at will, but differing from other tenants at will in many respects. He may make a lease, which is valid or not at the election of the mortgagee, is entitled to no emblements & pays no rent

Co. Lit. 660

Doug. 21

Co. Lit. 308

The mortgagee may direct the lease of the mortgagor to pay rent to him. This may be done whether the lease was prior subsequent to the mortgage. Such direction never precludes the mortgagee from considering the lessee as a trespasser.

1 Atk. 606.

Doug 279

It is a question whether the lease of the mortgagor is accountable when ejected, for the mesne profits to the mortgagee. It seems that he is not accountable, & for the same reason that a lessee of a disseisor is not accountable for the rents & profits to the disseisee.

11 Rep. 51

A lease made by a mortgagor between the parties, & given the lessee such an interest that he may redeem if he will, & the mortgagee elect to make him a trespasser, it affects not his right of redemption.

Estates Mortgaged

On a bill to redeem the ag. a mortg. against mortg. in possession a court of Eq. will grant an injunction

3 Atk. 725

A mortgagee in possession gains a settlement by twenty days adjournment on the interest of mortg. & mortgee is entitled

Dwg. 610 -

Dwg 21. - 68

see cases in margin -

The mortgee may transfer the whole or any part of his interest; i.e. mortg. in fee may make a lease for years, life or in tail or in fee. The mortgee may assume an estate not greater than his own but such estate will always be subject to the incumbrance of being redeemable. Sequent of the mortg. estate by the mortgee will act as effectual against the right of the mortgor to redeem.

A mortgee in possession may not commit waste. And on a bill by the mortg. against the mortgee to stay waste the Court will grant an injunction. But for waste already committed the mortgee is not liable in an action of waste. The damages from the estate will be deducted from the debt & interest. Nor damage is not to be stated at the exact value of the timber cut &c. If however, the security is defective the mortgee may be the purchaser satisfying his debt. Nor will not be made for a tenant for years.

2 Vern. 372

3 Atk. 723

Estates Mortgaged

Mortg^ee in possession may add to the principal & it shall carry interest, expenses which he may have been at in defending the title of the mortg^ee or in making improvements by which the estate is benefited provided the improvements were requisite to the management of the estate.

2 Atk. 518

Dis of acc in the redemption of mortgaged estates, adhere to the principle of equity that he who asks equity must do equity; & therefore if cost the interest amounts to more than the principal, no relief will be given, unless the mortg^r will pay the whole due. So if a mortg^r having a bad title obtains afterwards a good one, he shall make a new mortgage to the mortg^ee.

2 Ven. 11.

An equity of redemption of an estate is similar estate to the estate itself; & the same form are required to convey it that are requisite to convey the land themselves. It descends to the heirs; & the descent is according to the nature of the estate mortgaged. It is a devisable interest & husband may be tenant by the curtesy of it.

2 Ves. Mortg. 126

Ves. Mortg. 112

Pun. on Ch. 162 pl. 7

Where a mortgagee in mortgage, a widow, or a jointure, or a husband entitled to the survivorship, or devisee for life, & the remainder man, the rule is that the person entitled to a life estate shall pay one third of the mortgage money, & the remainder man the residue; these lives being considered equal to a third estate.

1 Atk. 505.

If he who is entitled to a life estate redeem the whole & deduct before repayment of two thirds by the remainder man, & not having enjoyed the term of his own life, the heir of him for life may claim of him in remainder the whole sum paid to redeem, deducting only an equitable proportion for the time his ancestor enjoyed.

2 Vern. 61
1 Vern. 411

An equity of redemption cannot be barred in estate so as to charge the heir to whom it descends with any debts of the mortgagor. In this the heir of an equity of redemption is charged with the debts of the mortgagor; & with all debts without distinction of debts by specialty & simple contract. But a 2d mortgagee also takes in lieu a mortgage of the equity of redemption, is entitled to his whole debt in preference to all other claimants.

2 Atk. 2 gr.
3 Ch. Ca. 81
1 Vern. 101.

If a mortgagee, or any one under him claiming the equity of redemption, not a purchaser for a valuable consideration, would redeem, he must pay not only the debt due upon mortgage, but all others which he owes the mortgagor at whatever time contracted. And if there be several mortgages, or several other

1 Vern. 29. 2-15

some for more than the value of the land mortgaged & others for less than the value of the estate, the mortgagee cannot redeem any without redeeming the rest.

2 Vern. 286. 287

It has been questioned whether a mortgage assigned for less than is due at the time of making the assignment, may not be redeemed on payment of the sum, for which it was purchased & interest thereon. The decisions are, that the whole sum due on the mortgage must be paid, without any regard to what was given by the assignee in the purchase. If a bankrupt purchase for less than is due creditors & legatees are entitled to the benefit of the bargain.

1 Vern. 175

1. Atk 155
2. Ch. Ca. 39
1 Ves. 87
3 Atk 556
2 Atkins 107

A purchaser of an equity of redemption for a valuable consideration may redeem by paying the money due on the mortgage notwithstanding the mortgee may have other debts against the mortgor.

2 Atk. 62.

If an agent, trustee, heir at law, or devisee purchase in a mortgage at less sum than is due, he shall be allowed, against a subsequent incumbrance no more than he actually gave.

Dick. in Ch. 7 511

The alienee of an heir at law of an equity of redemption may redeem, tho there is a bond debt to the mortgee without paying both.

Dick. in Ch. 151

Fraud in the mortgee towards a third person may exempt a mortgage from debts to the mortgee, which otherwise he must have paid, before he could redeem.

3 Atk. 315
3 Ch. Ca. 287

Lapse of time may bar the redemption; may bar the right of redeeming. The right of infants, feme covert, & persons beyond sea, is barred by lapse of time. The period after which there can be no redemption, is in Eng twenty years. This is the time fixed in Eng, because twenty years

MORTGAGES

is the period then limited, after which the right of redemption is taken away. It is conceived that by analogy, a lien in equity would bar the right of redemption in this State.

The ground upon which a right to redeem is taken away, we do not suppose to be, that it presumes sufficient evidence to presume the equity of redemption to have been precluded by the mortgagee. Therefore a release removes the presumption, and bars the right to redeem. But this upon the right of the mortg.e in possession to redeem cannot be found by lapse of time. And any thing showing the estate to have been a mortgage within twenty years, the right to redeem.

2 Vern. 377

1 Bro. C. Ca. 309

19 Ch.

2 Atk. 333

Found on the mortgagee's title a bar of the right of redemption by mere lapse of time

Salk. 65

At law, the Ld of limitation has once begun to run it continues to run notwithstanding infancy, marriage, imprisonment ~~[illegible]~~, or absence beyond seas.

When there is an assurance where the mortgagee goes into possession, that he shall hold till he is satisfied, the right of redemption is not taken away by any length of time.

In case of Wales mortgages the right of redemption is never lost. The condition of the mortgage being such that if the mortgagor his heirs, or assigns shall pay the mortgage money on the day mentioned in a certain month & year, or on the same day of the same month in any other year after, &c.

Mortgaged estates are now considered in law & equity as personal estate; tho said to be considered at law as real estate. They are in certain cases considered at law as real estate. In a will they are considered as personal estate. They pass not by a devise of lands, tenements hereditaments, requiring nothing more to pass them than to pass personal estate. They go to Exrs.

Burnett 428
1 P. Wms. 291

2 Ver. 478

Ambr. 615, 616

2 Vern 629
1 Vern. 5.

Mortgages

2 Vent 348. 351
2 Vern. 193
1 Vern. 170

A mortgagee dies nominally to the heir. the money due on the mortgage can be paid to the Ex. only; unless by the contract, it may be paid to the heir; & payment is actually made pursuant to the forfeit of the mortgage

1 Vern. 170

It appears to have been the intention of the mortg. to purchase himself of an estate the mortgage [illegible] to the heir. and if it appears to have been the intention of the devisor to devise a mortgaged estate, as real property, it passes as such

Burnitt 265

If several purchase lands, they are in law considered as joint tenants. this is not the case of several joined in a mortgage even if they joined.

2 Vos 258

A mortg. in possession is in no instance accountable for rents & profits.

3 Atk 214
3 Atk 107

A mortg. in possession is allowed nothing for the receiving of the rents & profits, unless he live at such a distance that he must employ a bailiff; in which case he may charge the allowance to the bailiff. An agreement between the mortg. & mortgee to allow them for their trouble in receiving the rents & profits of the estate, tho' will not be enforced

2 Atk 53.
3 Atk. 518
1 Vern. 216
2 Atk 120

The rents & profits are to be accounted for to the mortg^e by him who receives them. But if the mortg^e assign to an insolvent person, who cannot account, the mortg^e is not to be prejudiced by it; for the mortg^r himself shall then account.

3 Bac. Ab. 658

There has been much difficulty in ascertaining for what the mortg^r in possession shall account. No ~~rule~~ general rule can well be given. Each case must be determined by its own circumstances. The best rule that can be given is, that he shall account for what he receives, unless the mortg^e can shew that he ought to account for more.

A mortg^e who permits the mortg^r to take the rents & profits to the prejudice of other incumbrancers, not taking them himself nor suffering others to take, shall account to them for all the rents & profits, which he might have received.

1 Vern. 270
258

Mortgage!

Allowance of mort. a mortg.ee in poss.n for all necessary improvements, made on the estate or even such as convenience requires. But no rule which will probably in all cases can be given, by which to estimate the allowance to be made for improvements.

2. second mortg.ee wishing to redeem and not knowing the sum due on the mortgage may summon both the mortg.or & mortg.ee into Eq.y that they to depose on their oaths the sum to be paid. If the mortg.or & mortg.ee have ascertained the principal & interest at any time it is conclusive to the second mortg.ee, & must be stated by him if he will redeem.

3. If a mortgage has been assigned for a greater sum than is due upon it, the mortg.or may redeem by paying the bar exact sum which is due. Any fraud on the mortg.or or collusion on the mortg.ee will subject him to pay the whole benefit money to the assignee. Any expense which the mortg.ee may have been at to defend the title of the mortg.or shall be allowed him, & where the heirs of the mortg.or attempt to overthrow the mortgage by a sham enlistment, having failed in their attempt, & on application to redeem, the heirs are alleged to allow the mortg.ee reasonable costs

2 Ven. 556

The mode of applying the profits of a mortgaged estate, when they amount to more than the interest of the debt, is to deduct the annual interest from the profits & invest the surplus for the mortgagee. But as this is often a hard step upon the mortgagee on a very small excess the Ct will not oblige it to sink the principal.

2 Atk. 532

A forfeiture of the mortgage must precede the foreclosure. An application to foreclose may be made at any time after a forfeiture.

2 Vern. 232

When the mortgagee chooses to foreclose, the Ct decrees the money to be paid within a time, fixed by it or the right of redemption shall be forever barred.

If the mortgagee brings a bill to redeem the Ct decrees that he may redeem within a time limited. If he neglects to redeem within that time, he is barred in same manner as if he had made no application.

Mortgages

A mortg. is frequent when a second mortgage is made upon the estate, the second mortg.ee not knowing of the first mortgage, meaning to have it. supposing that he had an estate free from all incumbrances & this be known to the first mortg.ee, & he knows. where as to his own mortgage he shall be postponed to such second mortg.ee

A decree is in some instances obtained in Chy for a sale of the mortgaged estate, to pay the debt. If the proceeds of the estate sold are insufficient to satisfy the mortg.ees debt the mortgagor is liable for the residue.

The mortg.ee may pursue at the same time his several remedies, by action on the covenant for the money due, an ejectment to get possession, & by a bill for a foreclosure.

2 Atk. 3 & 4

When judgment is obtained and execution issued, the mortg.ee may levy on the person, personal estate or lands of the mortgagor. After obtaining satisfaction of his debt the mortg.ee can pursue his other remedies no further. It has been heretofore held that having the legal title, he might still prosecute his ejectment. It is now questioned.

The mortg.e having obtained ex.n may levy on the mortgaged lands, & so much as he takes in satisfaction of his execution he holds absolutely, & no longer as a mortgaged estate.

Notwithstanding the mortg.ee has obtained a recovery in ejectment, he may pursue each of his other remedies.

A foreclosure may be pleaded in bar to a suit on the contract for the money; but the mortg.r may omit pleading it, in which case the suit will be a waiver of the foreclosure.

If a part of the debt has been paid, & a foreclosure has been obtained the foreclosure has nevertheless been considered as a satisfaction of the residue only.

If the heir of the mortg.r exhibit a bill to foreclose without joining the executor it is a cause of demurrer: otherwise if the executor bring a bill without joining the heir. But if the bill is by the heir alone & the Deft does not except to it, the bill will proceed to decree.

Mortgage.

2 Vern. 61 — The heir of the mortg. having foreclosed may pay the mortgage money & interest & keep to him all the benefit of the foreclosure.

3 P. Wm. 338. — A bill to foreclose after the death of the mortg. must be brought against his heir.

2 Vern 518 — The 6th in a bill to foreclose must summon all interested in the mortgaged estate, the mortg. or his heir, him who has a remainder, incumbrances, and none are foreclosed who are not summoned.

5 P. Wm. 362 — In case of a foreclosure against an infant, he has six months after coming of age to shew cause against the decree. But the infant cannot unravel the account settled by his guardian; nor is he so much as entitled to redeem the mortgage, but paying what is adjudged due; his only privilege is to shew error in the decree. This privilege is not given to a feme foreclosed with her husband, during her coverture.

For various reasons a Ct will again open a case after a foreclosure if there has been fraud in obtaining the foreclosure; if the Ct has been misinformed thro mistake of the value of the land; if there is great inequality in the debt & the value of the estate; the case may be again opened. In E. if the inequality is so great as would induce an Eng Ct to open, the Ct will not foreclose. Instances of opening again are very rare in E.

1 Ves. 106 A Welsh mortgage can never be foreclosed.

A cause will never be opened a 2d time in favour of one claiming under a voluntary grant. Quere; if the deeds were unfairly obtained.

A mortgr having foreclosed devised the estate to the mortgee and died; a second mortgee brot his bill to have his debt charged upon the land & the Dr decreed in his favour.

2 Atk. 10. Ca. Ch. 5 & 1 Salk. Ca. 154

If twenty years have elapsed from the time of the foreclosure the cause will not be again opened. And if the foreclosure was by consent of the mortgr it is a strong circumstance against opening again.

If the mortgee exhibit his bill for a foreclosure, he cannot claim payment of any other debt than that by mortgage: otherwise if the bill is by the mortgagor.

Of Interest on Mortgages.

1 Bleach 253
1 Bur. 1078
contra
1 Ves 28
3 Atk 727

It is an unsettled point, whether a mortgage shall carry the interest of the country where the mortgage is made or of the country where the land lies. Vide also Burn.

Pac. in Ch. 160

Cases are to be found of an agreement, that if the money is not paid by a certain specified time, the interest shall be encreased from a lower to higher rate, and the encreased interest allowed. In all these cases the lower rate of interest was less than legal interest, & the encreased interest not more than legal. The encreased interest is considered in equity as a penalty & on that grounds relief will be granted against it. But if a higher rate is reserved, with a proviso, that the interest be punctually paid at a day, the mortgagee shall accept a lower interest, & the condition not performed the higher interest must be paid. A distinction has been attempted to be made, where the covenant to pay more, if the interest was not punctually paid, was upon a separate piece of paper, & when it was annexed to the mortgage.

3 Bur. 1974
3 Atk 520
Pac. in Ch. 165
2 Vern. 184

When there is any condition for the encreased interest, as if the rate of interest is to be encreased after a day specified, if the money is not then ~~therefore~~ paid, they will not relieve

1 Bro. Par. Ca. 68

No interest is allowed upon the interest of a mortgage, even if the parties agree to it — that interest not paid when due shall bear interest.

2 Salk. 449

If a mortgage is assigned with the concurrence of the mortgr, & the assignee pays arrears of interest due thereon such interest becomes principal & ever after bears interest.

1 Vern 169
2 Vern. 195

Otherwise if the mortge concur not in the assignment. So if the estate is sold by order of a decree in Chancery to sell, arrears of interest become principal when paid by the purchaser & shall bear interest.

3 Atk. 271
Pre. in Ch. 116
3 Atk 271

When on an exhibition to foreclose, there has been a report of the sum due on the mortgage the interest computed in the report carries interest. So if a cause be again heard, the whole sum on the report carries interest.

10 Ven. 652
3 Atk 722

2 Vern. 392
2 Bro. Par. Ca. 56
1 Ibid 117

But in case of a foreclosure against an infant, and the cause again opened, the interest in the report carries no interest

A account of the interest due reported by the mortg^e will not make the ~~int~~ interest principal, & carry interest, unless it be so expressly by the parties

Tender of the principal and interest before foreclosure of the mortgage defeats the title of the mortg^ee.

A tender must be made before a bill brought by the mortg^r to redeem in all cases where the sum due to the mortgagee is known to him: Otherwise where the sum is not known.

A tender stops the interest. But it is requisite that the mortg^r give six calendar months notice of his intention to make payment, & that the tender be made on the day notified

It is a gen^l rule that where the place of payment is not expressed in the original cont. tender must be made to the person. But when a mortg^e gave notice that he would tender on a certain day, at a place which he mentioned, it being a convenient place for the mortg^r & not objected to before at the time, a tender made accordingly was held good

2 Ch. Ca. 278

Mortgages — Interest on

A court will allow a parol agreement to lower the rate of interest reserved on a mortgage to be proved & cause the account to be made at the rate of interest agreed by parol.

2 Atk. 19
2 Vern. 350
1 Ch. Ca. 373
1 Ves. 6
1 Rep. in Ch. 1857

Fraud in a prior incumbrancer towards a subsequent one will postpone his prior right to the subsequent incumbrance. It has been adjudged, that if a bona mortgagee suffer a subsequent mortgagee without informing the subsequent mortgagee of his prior lien, it amounts to such fraud as shall postpone his right.

1 Ch. Ca. 280
1 Vern. 130

Negligence in a prior incumbrancer, by which a subsequent incumbrancer is encouraged, postpones the right of the prior to the subsequent incumbrance.

1 Vern. 189

If a third mortgagee or a mortgagee entitled to the third, purchase the title of the first mortgagee leaving them both the legal & equitable title, he shall be preferred for the payment of the money on both his mortgages to the intermediate mortgagee. But if the third or other later mortgagee has knowledge of the intermediate mortgage when he lent his mortgage he cannot gain a title to his third mortgage by purchasing in the first.

2 Ves. 573
1 Chan. Ca. 240
2 Vern. 387

Mortgages — Merger

It is questioned whether in C., where the deeds are registered the 2d mortgee can be postponed to the 3d mortgee by purchasing in the 1st mortgee title. The Supr. Court have once decided in favour of it.

This doctrine of overreaching the second by purchasing the title of the first has been carried thro all the niceties of technical reasoning; & therefore if the demand mentioned in the first mortgage is satisfied, when purchased & the title at an end, it will give priority to the ~~first~~ third mortgage, in point of payment to the second. In Hard. 172 is a case contradicting this. In 2 Vern. 159 it is said that the third mortgee purchasing in the first mortgage, shall protect his first mortgage tho he obtained the first mortgage by common means.

1 Vent. 339
2 Vern. 279
1 Vern. 187
Hard. 318. 172
2. Vern. 159

The Ct will give a preference to the legal & equitable title, united to the equitable title alone, it will go no further; & if the legal title purchased into a 3d mortgee be at all doubtful, the Ct will not amend the defect to hurt the second mortgee, notwithstanding the order be such as one in the Ct would amend between mortgee & mortgee.

2 Vern. 231

Mortgages — Interest on

A mortgage may be tacked to an old statute as to a prior mortgage.

2 Vern. 156

If a judgment creditor or creditor by statute or recognizance, purchase the title of a prior mortgage, it shall not, but secure his debt.

2 Ch. Ca. 42
2 Ves. 262
Burnsby 226

When a mortgagee purchases in a deficiency title to protect his own mortgage debt, he will amend it against all, not having a lien upon the land.

2 Vern. 564

If a mortgage be for the security of all other loans, it affects not the rights of creditors at the time of the mortgage. Such clause is, however good to secure subsequent loans against subsequent mortgages with notice of the clause.

7 Ven. Ab. 52.

Ye is not easy to a certain, in all instances, what is notice. Actual notice is always sufficient. Information under such circumstances as would reasonably induce a belief is not sufficient notice.

Ye is an invariable rule that notice to an agent is notice to the principal, unless in such cases as the statutes expressly provide the notice shall be given to the party himself.

1 Ves. 69

Mortgages - Interest on

If one has the means of knowledge of those means are copy of deeds, he is presumed to have notice.

2 Ves. 180

What is in a man's deed he is presumed to know.

It is said to be a rule, that such notice as induces an enquiry, is sufficient, if knowledge was attainable by enquiry.

1 Atk. 490

It is a rule settled by adjudications in the Eng. Cts., & recognized in ours, that a man obtains no title by a subsequent deed, first recorded, if he had knowledge of the prior deed.

Cooper 712

It is questioned whether a mortgage is an incumbrance upon the real or personal estate of the mortgagee. The decisions are in favor of charging the personal estate; & therefore the heir to a mortgaged estate, may claim the benefit of personal estate to disincumber the land.

3 Bro. C. Ca. 14
Ward. 512
Prec. in Ch. 61

A Devisee has the same claim on the personal effects, as the heir, to exonerate his estate from an incumbrance that the heir has. If however it appears to to have been the testator's intention that the devisee should take the estate as it was, with the incumbrance, the personal effects are not exonerated. But the presumption is in favour of the devisee that he has a right to claim personal effects.

Prec. in Ch. 177

A Devise of all the personal estate in specific legacies has been adjudged such an indication of the testators intention that the devisee should take the estate with the incumbrance as disincharged his personal property. But a devise of all the personal estate in specific legacies does not bar the right of the heir to have the lands freed from all incumbrances.

1 Vern. 698

1 Bacon Ch. 252 - 451

If the intention of the testator be clear, that the Devisee should have his estate free from all incumbrances, & the personal estate, tho' insufficient to discharge the mortgage upon it, he should have aid from the heir if there be real estate not devised.

When one devised a mortgaged estate subject to the incumbrance upon it, & also devised other estate to pay his debts, it was adjudged, that the mortgage was one of the debts to be paid out of the estate devised for the payment of debts, & therefore that the Devisee takes his estate free & clear.

2 Atk. 380

2 Atk. 124.

Id. 430

Of lands are devised to pay debts & legacies the personal estate should, nevertheless, be first exhausted.

2 Vern. 349

2 Bro. C. C. 290

Mortgages. Interest &c

The reason that the heir shall be allowed out of the personal estate of his ancestor for the money given in redemption of a mortgaged estate, is, that it is the personal estate which is benefitted by the money borrowed; & therefore where this reason fails; as when the heir inherits not from the ancestor, but from one who furnished the equity of redemption of the mortg^e. And where one, whose personal estate is not benefitted by the money lent on the mortgage, covenants to pay the sum due on the mortgage, his personal estate is not liable.

1 Bro. in Ch. 101
16 Ven. 8 & 7
2 P. Wm. 659

A mortgage of the wife's estate by the husband incumbers the land no longer than his interest in the lands lasts: If the wife join with the husband, unless the conveyance be by fine, she, nor her heirs are bound.

2 P. Wm. 127
Sale. 51

In this country a wife may join with her husband in a conveyance of her real estate, & is bound thereby.

Ch^y will not compel the performance of a contract of a fine or wife, & therefore if she agree to levy a fine she is not bound 2 Vern. 61 contra.

2 Vern. 61.

A mortgage by husband & wife of the wife's estate may be affirmed by the wife after a determination of the coverture.

Doug. 58

A mortgage of the wifes estate by deed & fine in which the husband & wife join, & the husband pays part of the mortgage money, & afterwards borrows of the mortg^ee the sum paid, binds the heir of the wife for the sum due on the mortgage.

1 Vern. 41

If husband & wife levy a fine of the wifes estate, to secure the payment of a sum of money, lent to the husband, the personal estate of the husband is liable for the redemption of the wifes estate, in preference to all persons claiming by a voluntary grant.

1 P. Wm. 264

2 Vern. 337. 604

If a wife having joined with her husband in a mortgage of her, cannot obtain sufficient out of the husbands estate personal to redeem her estate, she may come in the place of a mortg^ee of the husbands real estate, descended to the heir till her estate is disincumbered, by a redemption of the mortgage.

The rule is, that the chose in action of the wife, not reduced to possession during coverture, survive to the wife or her heir after a determination of the coverture. Cases of a jointure settled on the wife before marriage are in equity an exception to this rule; & the jointure is considered as a purchase of the wifes portion, & entitle the husband to her chose in action. The settlement must be equivalent to the portion.

2 Vern. 501

MORTGAGES - INTEREST ON

The chose of the wife survives notwithstanding a jointure, subsequent to the marriage.

2 Atk. 114.

If the wife's portion is a bond debt, & there is a settlement in consideration of part thereof, which part is paid, the residue survives to the wife & shall not be taken in ease of the heir, to pay debts.

Rec. in Ch. 63

A mortgage to the wife while sole is a chose in action entirely in the power & at the disposal of the husband. It differs from other choses in this, that if the husband make a voluntary assignment of it, it does not take away the wife's right to it, but it still survives to her.

Rec. in Ch. 412

2. Vern. 101

If a wife applies in Ch. for the benefit of a mortgage to her, in the hands of her bankrupt husband's creditors, Ch. will not aid her; but if the creditors of the husband apply in Ch. for the application of a mortgage to the wife to satisfy their debts, the Ch. will not decree an application without reserving the wife's portion.

1. P. Wm. 158

3. P. Wm. 197

2. P. Wm. 310

A mortgage subsequent to the marriage does not affect the right of the wife to dower. Otherwise in this state, where the husband can defeat the wife of dower, by alienation.

But it is held, that if the mortgage was prior to the marriage, the wife shall not be endowed of the equity of redemption.

10 P. Wm. 700 con.

If a settlement is made upon the wife of lands incumbered with a mortgage, & the husband afterwards borrows more money on the mortgage, she shall not redeem, after his husband's decease, without satisfying the subsequent loan, unless the mortgee had notice of the settlement when the subsequent money was lent.

A mortge subsequent to jointure made after marriage, shall be preferred to the jointress; altho the had notice of the jointure when the subsequent mortgage was made.

A mortgage taken by the husband to himself & wife, is his & the survivor's — not however, to the prejudice of creditors.

Hard. 166
Ono. Cas. 190

The wife is not endowed of a mortgage to the husband.

Of Estates upon Condition.

In a grant of an estate for life, or any less estate, there is tacked an implied condition, that the grantee will not make a greater estate than he himself possesses. If this condition is broken, the estate which he has is forfeited. So if a tenant for life or for years commits a felony his estate is forfeited, the reading on the condition that he should not commit a felony. Those forfeitures depend on feudal reasons, which exist not here. There is no forfeiture for felony, whereon there may be for a greater estate created by a tenant for life or for years, than the tenant himself possessed.

Conditions are precedent, subsequent. The former are conditions on the event of which an estate is to commence; the latter are such as by the happening of which an estate already vested is defeated.

A distinction is made between a limitation & a condition. In the former the estate absolutely determines when there is a breach of the condition; in the latter the estate continues, till there is some act of the person next in expectancy taking advantage of the broken condition. If there be a limitation over, after an estate upon condition, the condition is destroyed by the remainder, & the case becomes the same as that of a limitation.

1 Co Rep. 41

If a condition subsequent is void for illegality or other reasons, the estate continues as if there had been no condition, notwithstanding there be a breach. And in case of a void condition precedent the estate can never exist.

Co Lit. 206

Of Remainders and Executory Devises

Our law relative to remainders is altogether different from the law of Eng, being the same as the Eng law of Executory Devises.

The maxim of the Eng law that a freehold estate cannot be made to commence in future, is to be understood as meaning, that a freehold estate cannot be made to commence in future without an intervening estate.

An estate to commence upon the determination of another estate is called a remainder.

Remainders are either vested or contingent. A vested remainder is a remainder limited upon any estate, which is not to vest, nor become a fee simple, & to a person of a person capacity to take it, if the first should immediately determine. If the first estate may continue till there can be no possibility, any one to take in remainder; if there be more of persons capacity to take in remainder, if the first estate should determine, the remainder is contingent.

By way of executory Devise a freehold may be made to commence in futuro, without an intermediate estate.

The maxim that a freehold cannot be limited after a fee does not hold in devises.

Likewise the maxim, that a freehold is a greater estate than a term for any number of years; & the consequence of this maxim, that a grant of an estate for life out of a term for years must comprehend the whole term; & of course no remainder can be of a term, after an estate for life, expunted out of it, do not obtain in Devises.

If there be a devise for years, and afterwards a freehold in remainder, livery of seisin must be made to the lessee; & if the tenant for years, forfeit his estate, the estate in remainder is defeated. But if there is a devise to one for years with remainder to another in fee, the remainder is not affected by a forfeiture of the estate for years.

Co. Lit. 298
1 Roll. 815

A contingent remainder is lost if the particular estate, upon which it is limited, is void in the creation, or is by forfeiture or otherwise determined before the remainder becomes vested.

Vested remainders are, in some cases defeated by a forfeiture of the base estate, & in others, they are not. These cases are distinguished by a right being reserved to the grantor to recover upon the estate, if a forfeiture is incurred in some cases, & not in other. In the former the remainder man loses his estate by a forfeiture of the prior estate; in the latter the forfeiture is always to the remainder man immediately; he loses not his estate.

A contingent remainder must
1 Co. Rob. 128 vest while the previous estate continues,
3 Co Bac. 21. or eo instanti it determines.

A contingent remainder is void if the possibility that the remainder
2 Rep. 51 may vest be too remote; & the possibil-
Co Lit. 378 ity is always too remote when there is a double contingency.

A contingent remainder cannot be limited upon a less than a freehold estate.

1 Co. Rep. 130

Trustees to preserve contingent remainders are appointed to prevent such interests from being destroyed by a forfeiture of the particular estate. In these cases the estate rests till the contingency happens, if it ever will happen. See the note in the margin for an apparent contingency but no event.

Mich. 232
2 Chary 533

It is not essential to a vested remainder, that there be a certainty that it will at any time take effect in possession. See cases in margin.

8 Ve. 138
1 Ld. Ray. 366

It has been questioned whether a contingent remainder can be transmissible interest. It is now settled that it is.

Of Executory Devises

A executory Devise of lands is such a disposition of them by will, as is not to take effect when the death of the testator, but subsequent upon the happening of a contingency. To be an executory Devise it must be such a disposition, as that it cannot be good as a remainder, being contrary to the rules of the com law; otherwise it will be a remainder.

It differs from a remainder as it needs not a particular estate to support it. It may also be limited after an estate in fee, to determine upon a contingency which a remainder cannot. But an executory devise is void, if the contingency upon which it is to take effect, may by possibility, not happen till a greater length of time than a life, or lives in being, — twenty one, or at most, less than twenty two years after.

1 Co Rep. 137

3 Atk. 287

Devises Executory

A executory devise may be of a term for years after an estate for life. But the remainder of a term must be limited to one in being, during the life of the first devisee; and the devise must be to take effect upon a contingency, which will happen, if ever, in the life of the first devisee.

3 Atk. 285

By 2 & 3 W. an estate may be made, by deed or devise, to a man & his immediate descendants; but can be restrained no further.

If a man grant his farm reserving, reserving a house standing thereon, he also reserves the land, on which the house is placed for an unlimitted time, i.e. so long as the house shall continue to stand there. The grantor has a right to repair the house, if it is real estate. If the grantor, reserve to himself the trees growing on the land, or the emblements they are real, but personal estate.

Merger

When tenant for years or for life becomes by any means entitled to the fee, the freehold swallows up the lesser, & he becomes tenant in fee of the whole estate. There is however, no merger unless he has both interests in the same right. Bail tenant in tail leaving also the reversion, has both interests separately, & the freehold does not merge in the fee.

Of Joint tenancy — Coparcenary — And Tenancy in Common.

There may be a joint tenancy in personal as well as in real estate, except in the trading stock of Merchants, & the stock on a farm.

To make an estate to be held by several in Joint tenancy, they must have the same title, created at the same time, have the same quantity of interest, & a equal proportion. If there is a grant of an estate to several, & no words explanatory of the manner in which it is to be holden, the presumption of the Eng. law is in favour of joint tenancy. By a stat. of Geo. 2, if the grant does not make the estate a joint estate it shall be taken to be a tenancy in common. In C. the Eng. law of tenancy in common implies to estate in joint tenancy, as well as tenancy in common.

A joint tenancy can be in no estate not acquired by purchase.

Some estate descends to several & is an estate in coparcenary. Such an estate can be only of estates of inheritance.

If one coparcener dies & his estate descends to his heirs it still continues a coparcenary. But if one coparcener alienes the alienee is no coparcener.

No other unity than that of possession is necessary to a tenancy in common. It may have any of the unities of joint-tenancy, if it can not them all & their word make a joint-tenancy. So to other words in a grant make a tenancy in common

6 Rep. 52. See 6 Rep. 52.

The same words in a deed & in a will have different constructions.

2 Roll. 17
1 Vent. 32

Livery of seisin to one joint tenant enures to both. So a delivery of a deed to one is a delivery to both. The entry & ouster of one enures to both. A parol lease by both reserving rent to one, is reserving rent to both.

Joint-tenants must sue & be sued jointly. One joint tenant cannot sue the other in trespass. But the one joint-tenant may have bill, or an action of account agst another.

One Joint tenant may have a Ejectment to gain possession for himself against another who holds him out of possession. So one may have his share in the estate, but if he make a lease of the whole it is a void lease.

At com law one Joint tenant could not compel another to make partition. It is now by stat otherwise.

The possession of one Joint-tenant being the possession of another, the right of one cannot be barred by sole possession of the other for any length of time. There is, however, this exception. If the possession be adverse, it may be a bar to him out of possession.

Cowp. 218

The Jus accrescendi is a peculiarity of Joint-tenancy. Per adjudication in Otis ~~case~~ v. Otis does not obtain here. Where the Jus accrescendi or right of survivorship is obtained, the right of a Joint-tenant is cut off from his heirs. And if a Joint-tenant devise his share of the estate, the devisee can take nothing.

Root 18. Hutchinson

Co. Lit. 188.

A joint tenancy may be broken by a partition of the estate. And if the parties make bounds of separation those bounds are a sufficient evidence of a partition.

If one joint tenant aliens, the joint tenancy is broken; & the alienee is tenant in common with the remaining joint tenant or tenants. But if there be three joint tenants and one aliens, the joint tenancy remains as to the other two. So if there be three & one alienee his share be one of the three, the two are still joint tenants as to two thirds.

Parceners could at com. law compel a partition. They may use or be seized jointly or severally. They cannot have an action of trespass one agst another. One parcener cannot either at com law or by St. have waste against another. But one may have an action of account agst another. The possession of one parcener is the possession of all.

Where there is a joint interest in a mentioned & indivisible thing, & the thing is destroyed by one of the owners the other may have his action against him.

Tenants in com gen sue & are sued separately, but if they gain it is well.

In Eq where some of the parties will not divide or the parties cannot agree in a division, the mode of obtaining a division is by writ of partition. In this writ it is usual & essential, that the Pl. set forth his own interest in the estate & the interest of the Defts or Pets, & the quantity of interest each one possesses. He must also state a refusal by the Def or Defts to divide or a disagreement or an attempt to make a division. These are all matters of fact which must be made out by proof, & are to be tried by jury. If the Pl. succeeds the judgment of the Ct is, that partition be made, & the Sheriff is ordered to make partition. The Pl. proceeds to make partition by taking twelve men with him who make the division. The Shff makes returns of his doings to the Ct, & if any improper conduct in making the partition may be remonstrated against.

In Eng. the Ptf. if he prevails recovers no damages; in C. nominal damages are given.

All the proceedings till the judgmt & the judgmt itself are the same in C. as in Eng. The Sheriff is in like manner directed to make partition. But he makes partition by the men only & makes no return to C.; but a return to the Town Clerks of in which a record is made of the return.

Of the manner in which Real Property may be acquired.

Real property may be acquired by purchase or descent.

Of Descents & Distribution of Estates.

The old St. of Distribution in C. was copied from the St. of Car. & the new St. of V. is no more than an alteration of the old St. in some parts. The St. of Car. had a construction in the Courts when the St. in this State was made. From these circumstances Mr. S. is of opinion, that it must have been the intention of the Legislature, when they made the old St. that the same construction should be given to it which was given in Eng. to the St. of Car. & that the new St. except where altered, being only an alteration of the old should be governed in the construction by the construction of the St. of Car.

By the St. of Car. the estate of the intestate descends first to his children or their legal representatives; and on failure of issue, to his next of kin in the collateral line.

Estates Descent &c

In computing the degrees of kindred the mode adopted by the civil law is followed with in Eng. &c.

The Law allows not a representation to go further than the children of Brothers & Sisters.

In distinguishing when persons are to take by virtue of their own relationship to the intestate, whether they are in the collateral or descending line, or by representation of another, it is a rule, that if the persons entitled to a share are in the same degree from the intestate, none can take by representation; but if those who are entitled to share are in different degrees from the intestate, as some brothers & others nephews, or some children & others grand children, they in the remotest degree take by representation of their of their ancestor.

By the Roman law no distinction is made between the half & whole blood

16 Vin. 594. 26

In estate vests in the person entitled to it, under the Statute of distributions immediately on the death of the intestate and before distribution. A posthumous child has the estate vested in him before his birth.

2 Atk. 45. 117

1 Vent. 216. 327

1 Ves. 333 — As the mother is in the fifth degree, it seems that she would take in exclusion of brothers & sisters. But by 2 & 3 Ed. VI. she is degraded
3 P. Wms. 50 — to the rank of brothers & sisters & their legal representatives. She is, however, degraded
2 Ves. 213 — with respect to no others & takes as in the first degree as to all other relations.

When the Grandfather is in the second degree with brothers & sisters, yet the
1 Atk. 454 — King Ats. have decided, that the latter take in
Talk. 251 — exclusion of the former.

The Mother does not take to the exclusion of the nephews & nieces when brothers
1 Atk. 458 — & sisters are all dead, tho they are in the third degree, & representation of brothers not existing, all the stock of brothers & sisters being dead. The nephews & nieces in this case take per stirpes with the mother what the parents would have taken; & Ld. Hardwicke thinks that they may then take by representation upon the ground that the stock of brothers & sisters with the mother, from the Ld. remains with brothers & sisters remains.

If the father be living he excludes all others. But if the mother be only living she shares the real estate with the father, tho she takes no share in the personal estate with her husband, the father. This is under the 22 & 23 C.

Of Distribution under the Statute of Connecticut.

The 1st Sec. relates to the distribution of personal estate only; the 2d Sect. relates to the distribution of both real & personal property.

In the distribution of real & personal estate to lineal descendants there is no difference under the St. of Con. & under the St. of C.

Under the St. of C. the personal property, & such real property as the intestate acquired any other way than by descent, devise or deed of gift from some ancestor, descend together to the same person or persons. But such real estate as came by descent, devise or deed of gift from some ancestor may descend in a different course to different persons.

In the distribution of personal property & of real estate not ancestral, kindred of the whole blood are always to be preferred to kindred of the half blood in the same degree; but kindred of the half blood in a nearer degree take in preference to kindred of the whole blood in a more remote degree. In the distribution of real estate ancestral the distinction of whole & half blood does not exist.

In the 16th paragraph it is provided, that, in case the intestate leave no issue, and dies seised of an ancestral estate, the residue of such estate, after one third to the widow be left, of the intestate leaves no widow, shall belong equally to the brothers & sisters of the intestate, & those who legally represent them of the blood of the person or ancestor from whom such estate descended. The words "of the blood" used in this clause of the St. have received two different constructions; one the feudal construction lineally descended, the other of kin. Omitting the former to be a just construction, the provision in the next clause of the St. that "in case there be no such brothers "or sisters nor legal representatives, as aforesaid, "then such real estate descended as aforesaid, shall "be & remains to the next of kin, to and of the blo-"od of the ancestor from whom" &c. cannot possibly have the least effect where the estate came from a parent; for none but brothers & sisters & those who legally represent them can be lineally descended from the parent. In general it is clearly in the St. upon this construction, where the estate came from any other than a parent or other ancestor, or if came from a brother, uncle or any other collateral relation,

or kindred, an escheat of the estate was from the the parent; for there can be no such person as brother or sister, descended from a brother, kindred or other collateral relation. The rule of which this latter clause of the St. would not be totally superfluous or absurd, admitting the feudal construction of the words "of the blood", would be that of an estate descended from a higher ancestor than that of the parent; & thus of the three cases would be much the most rare. It cannot, therefore, be supposed that the legislature intended that these words should be taken in the feudal sense & not in mean of kin.

We object that "of the blood" does not mean lineally descended the Stat. is totally tautological. The words of the St. are "next akin to & of the blood of the ancestor" which is the same, on the construction contended for, as the "next akin to & akin to the ancestor" &c. We suppose that the words "the intestate" ought to be inserted after the words "the next of kin to" which would read the St. to read thus; "the next of kin to the intestate & of the blood of the ancestor" &c. & thus remove the objection of tautology.

The Act proceeds to make provision for the distribution of such estate of the intestate, as did not come or descend from any parent, ancestor or other kinsman by descent, devise or deed of gift; & says that "the remainder "both of the real & personal estate, ~~of the whole blood~~ "equally to every of the brethren & sisters of the intes- "tate of the whole blood, & such as legally represent them, "or if there be no such kindred, then to the parents "of the deceased; & if there be no parents or parents "then equally to every of the brethren & sisters "of the half blood of the intestate; but if there be no "parents brother, nor sister ~~of the intestate~~ then equally "to every of the next of kin to the intestate in equal "degree ~~to the intestate~~, & those who legally repre- "sent them". This last clause "& those who legally represent them" Mr. Pa. supposes to be misplaced, & that it ought to have been placed after the words "every of the brethren & sisters & of the half blood of the intestate" to this clause as now placed the symmetry of the Stat is destroyed. Provision is made for the representatives of brothers & sisters of the whole blood, & for the representatives of the next akin, however remote they may be, & whether of the whole or half blood, while the representatives of brothers & sisters of the half blood are neglected.

Such on the Act now cited it continues to apply. In one clause it says "that no representation shall be admitted after brothers and sisters children"; & in another "that the representatives of the next akin shall take" which representatives must always be more remote than brothers & sisters children. So by putting this clause after "brothers & sisters of the half blood of the intestate" the asymmetry of the text is restored, & the inconsistency of the two clauses altogether removed.

Of Distribution under the St. of N. York.

The distribution of personal property is the same under this St as under the St of Car. II

In C. it is mentioned whether the claimants in equal degree take per capita or per stirpes. The St of New York has expressly provided that they shall take per capita. This St. Dr thinks ought to be the construction given to the St of Car. II also to have Stat.; & that representation is to be admitted in no case of claimants all in equal degree.

This Stat makes provision for the distribution of real estate in case of issue of the intestate, of father, brothers, & sisters, brothers & sisters children, & leaves all other cases to be governed by the common laws of Eng.

The estate descends to issue, if the intestate has issue, in the same manner as it does in this State. If the intestate has no issue, the father takes to the exclusion of all others, unless the estate descended from the mother, or some maternal ancestor or kindred, in which case the father cannot inherit, because not of the blood of the ancestor from whom it came, & the estate descends as if no father were living.

If there be no further living, the brothers & sisters inherit equally, & without distinction of half & whole blood. But if it be an unoccupied estate, no brother or sister not of the blood of the ancestor, can inherit; there being in this case no distinction between whole and half blood.

The children of brothers & sisters by an express provision of the Act in all cases take per stirpes whether any of the brothers & sisters are still living or not. For other cases of descents see the Eng. com. law Black. &c

The principal modes of acquiring real property by purchase are by Devise, Nomination, & Levy of Execution.

Of Devises

Devises were known among the barons in Eng; but an end was put to them, as well as to all other modes of transferring real property by tenants, by the feudal system by the Norman Princes. But the restraints upon alienation were off much before devises were allowed; first by allowing a part of lands of a certain description to be alienated, & afterwards by allowing an alienation of the whole.

To avoid the restraints laid on devises the doctrine of trusts was introduced. The method in which this effected the transfer of property by way of devise, was, that the owner conveyed away his lands in trust, for himself. This conveyance vested the legal title in the trustees & the grantor was entitled to the beneficial interest. Sta. of Eng. would confirm a settlement of this trust. Pur interest & the cestui que vse was devisable. But the st. 27 of Henry 8th, called the st. of uses, defeated this expedient, by vesting the legal interest in the cestui que vse or the person for whose use the estate was conveyed in trust.

Devises

By the ~~[illegible]~~ 32 of Henry 8th power is given to all owners of lands of a particular description to devise them. In the 34th year of the same prince's reign another Act was made declaring persons under certain disabilities incapable of devising their lands. See a. 4 of Car. II. Further regulations are provided relative to wills.

It has been a point much disputed in C. whether feme covert can devise their real estates. The Ct says that idiots lunatics & other disable persons have not power to devise. The question is whether feme covert fall under the description of disable persons. The C. is of opinion that feme covert may devise, & so it has been once decided by the Exchequer Court of Errors agst the unanimous opinion of the Sp Court.

A construction has been given to the Act of Car. when the Act of C. was made; that construction being known to the framers is to be given to the latter.

No particular form is prescribed for a will either by the Eng. Stat. of the State of Connecticut. It is sufficient that the intention of the testator be so expressed as to be understood; & whenever words are used, the intention of the testator is to govern, unless that intention be to create an estate contrary or under as to the laws of the country.

A will has no effect till the death of the testator. It is ever consistent revocable & cannot be made irrevocable. A disposition of an estate by deed, not to take effect till the death of the grantor is a testamentary device or disposition revocable.

Finch 195
1 Wms 117

A widow is for her dower considered in Equity as a creditor. This being the ch. it is doubtful whether she may not claim against any one, claiming a voluntary conveyance.

A will made at several times may be taken as one entire will & is good.

16 Ver. 578

Devises

Several wills, one disposing of one piece of

Show 545 553-549 estate & matter of another may be united & make but one entire will. And if in a subsequent will, part of an estate is disposed of, which was disposed of in a prior will, the subsequent will is a revocation of the prior will pro tanto but not a total revocation. vide post contra -

Co Litt. 721 1 Ves. 187

A will may refer to other writing so as to make those writing a part of the will. It is not requisite that those writing should have been executed with all the forms & solemnities of a will

p. 6. Wm. 530

A Codicil is an addition to a will. A legacy given in a codicil to a person who is a legatee in a will, tho it be of the same value as the legacy in the will, is taken to be additional.

A devise descend immediately to the heir, & not, like a legacy, thro the hands of Exors. If there be need of the devised estate to answer to answer the demands of creditors, a Ct of Chancery will order the Exor to sell enough of the lands devised to discharge the debts.

It was long questioned in Eng whether contingent interests were devisable. It is now settled that such interests are devisable.

16 Ser. & Rep. 292

H. & Black.

The same question. The surplusage may arise under our St, the words of which are "the estate which a man has"

In Eng some estates are not devisable — in C. all are devisable

A Will in which there is a devise of any real estate must be signed by the devisor, or by some other person at his request, for him, in the presence of three or more credible witnesses, & by them attested in the presence of the devisor. If these requisites are not complied with the will is void as to the real estate.

If a subject of G. B. residing in another country, devise his lands in Eng by a will made in the manner, & with all the solemnities required by the laws in which he lives, such devise is void, unless it have all the solemnities required by the laws of Eng.

2 D. Wm. 291

Devises

A will to devise of a trust interest, grant, or to charge real estate with the payment of debts or legacies, must be written, executed & attested in the same manner as a will devising the land itself.

2 Ld. Raym. 268
2 Atk. 268-285

One may by will only power another to convey a devise his lands. And a will disposing of lands in execution of a power to devise, given in a will, must be made with all the requisites of the Stat. And a devise of lands to an exr to sell for the payment of debts or legacies must be made with the same solemnities which are required in other cases of devises.

Wills — Of Signing

3 Mod. 219
2 C. 3. Lev. 1.

The name of testator written by himself in any part of will is held a sufficient signing within the Stat. But if it appears to have been the intention of the testator to subscribe his name to the will, it is not sufficient that his name appear written in the body of the will.

Dougl. 229

1 Wms. 313 contra 2 Strang. 764

Sealing is not signing within the Stat.

A will by which land are to pass, must be signed by the testator in the presence of three or credible witnesses in order.

The witnesses to the execution of a will must subscribe their names in the presence of the testator. By the 4 witnesses is to be proved the execution of the will by the testator; the sanity of the testator at the time of the execution; & the subscription of the witnesses in the presence of the testator.

If the witness has an heir it is sufficient to prove their hands & the hands of the testator.

Devises signing &c.

1 Ves. 155
3 P. Wm. 253

An acknowledgement of the signing by the testator is sufficient, & answers all the purposes of an actual signing in the presence of two witnesses. But nothing short of an actual acknowledgement has been admitted; except in a case in Comy. Digest. 1917 —

Before the stat. of Car. it was necessary to publish a will. Since that stat. it has been considered as unnecessary to observe that ceremony. But as the stat says nothing about publishing, it is said, it cannot be considered as dispensed with. Mr. B. thinks that the formalities required by the stat. amount to what was a publication at com. law.

3. Atk. 263

If a will is written on several distinct pieces of paper the whole must be present in the room when attested by the witnesses; but if there be not positive proof that some part was absent it may be left to the jury to find whether the whole was present

3. Bur. 1773

Sel. 688
Carth. 81
Salk 395
1 Brown Ch. 99
1 Show. 84
1 P. Wm. 299
2 Show. 288
1 P. Wm. 710
Doug. 241

The witnesses are said to subscribe in his presence if it was within the possible view of the testator. If it be done in a clandestine manner it is ill. Tho in the room & within the possible view of the testator. If the testator is in a state of insensibility when the witnesses subscribe it has been a question not a doubt, if within the ?

From the cases cited in the [illegible] seems admissible, that if there be a will and a codicil on separate papers, one executed according to the Stat. & the other not so executed, that only, which is well executed, is good. The reason of this Mr Ch. supposes to be, that the will & the codicil are in this case, considered as different instruments. If the will & codicil are on the same piece of paper, they are both taken as one will; & if one is executed according to the Stat, it is an execution for the whole. Id quod est a proper execution of the will will make good the codicil, which is not well executed.

Comyns 531
2 Strang 1109
Carth. 80
1 Show. 68
Salk. 236
Comy 384

If the subscribing to a will are dead, it cannot often be proved that the witnesses subscribed in the presence of the testator. In this case it is held proper to be left to a jury to find whether the witnesses did actually subscribe in the presence of the testator or not.

It is not necessary that the several witnesses to a will should subscribe it in the presence of each other.

Devises — Of the Credibility of Witnesses

A legacy or a devise to a witness of a will is by Stat. declared void, & such legatee or devisee a good witness. Our law in this respect is the same as the Eng law before the Stat., & the rule seems to be, that whatever renders one incompetent in other cases disqualifies him as a witness to a will.

1 Ray 5 1/2
1 C. Comy. 91

Whether incompetency in a witness at the time of attesting the will, can be so purged by a removal of the disqualification, as to make the witness qualified or competent is a point which has been much agitated in the Eng Cts. Respectable names have appeared on the side of competency at the time of attestation, as being indispensible; while others, not less respectable, & equal in number, have holden it sufficient that the witnesses are competent when called upon to prove the will. The late cases decided according to the opinion of the latter

2 Strang 1258
1 Bur. 414
Moseley 251
2 T.

A legatee may be a witness against a will but cannot be compelled to testify.

Salk. 691

A will disposing of personal property, is good without witnesses. And a will without witnesses, in which there are devises of real property & also legacies of personal property, is a good will as the legacies, & void as to the devises. Wd. therefore be objectionable, as it may often defeat the intention of the testator, which is always to be regarded.

It is a rule of the Eng laws, that there cannot be a devise of any thing, of which the devisor has not actual seisin. This rule, however, applies only to such interests as are capable of seisin. This is so far our law, that an estate doth not pass by devise, which the devisor acquires subsequent to the making the will; but all interest, which the devisor had, when he made the devise, passes by it, whether in actual possession or not

Lands articled to be conveyed may
2. Ath. 629 be devised by him to whom they are to be conveyed.

As they consider that which is contracted to be done as actually done, any cont. to convey lands, which they will decree to be specifically performed, gives such an interest as may be devised.

Devises - Construction of Wills &c

2 Ch. Ca. 214

In a single case it was said by the Chancellor, that a devise of lands to pay debts did pass other purchased lands. Mr. Thomas thinks this opposed to the gen. current of authorities.

Co. Lit. 113

Cowp. 461

A power given by will is, in some cases, a naked power, & in others a power coupled with an interest. The distinctions in any decisions between such devises with a naked power, & devises giving a power with an interest. It is important to distinguish the two cases, in in the one the authority given must be literally executed, by all & the same persons; in the other it may be executed by some of the trustees or survivor, or by those in whom the interest vests.

It is an unexceptionable rule in all cases of a naked power, that the power must be executed by all, & the same persons in whom it is vested; & if one dies the other cannot execute it.

Of Revocation of Wills.

Revocations are either express or implied. The former are regulated in Eng by Stat. In C. there is no such Stat, & the Eng Stat being a Stat of Eu. in C. no force there; our law is therefore, probably the same, with respect to express revocation that, as the Eng com law before the Stat was made. Implied revocation are, in Eng regulated by com law, & the same is our law.

At com law any writing signifying the intention of the testator to revoke had effect as a revocation. And at com law a will might be revoked by parol also. Whether the Act in C. would admit of a parol revocation is doubtful; & a difference of opinion on this point is entertained among Lawyers. M. C. opinion is in favor of a parol revocation.

10 Rott. 615

Words which literally amount to a revocation, spoken by way of exaggeration, & not with a serious intention to revoke are not a revocation. So neither does a declaration by the testator that he will revoke, having relation to a future time, have effect to revoke.

Co. Lit 115

Co. Lit 297

Moore 870

A declaration by one, who had devised his land, that the person who was his heir at law should be his heir, was adjudged an implied revocation of the will.

Id. 79.

A second will, not inconsistent with the first, does not revoke the first, both stand together. If the second will be different from the first it revokes it. But a codicil revokes a former will no farther than the testator's intention is therein expressed to alter.

3 Wils. 511. P.C.
2 Black. 937 P.C.
Cowp. 88 P.C.
2 Bro. Par. Ca. 341
1 Ves. 178. 186
3 Mod. 206 — 1 Roll. 618. 378

A disseisin of the testator is a revocation. If the testator dieth, the disseisin is purged & the will stands. A will will be carried into effect by the notwithstanding a disseisin by the heir at law for the purpose of defeating it.

11 Rep. 51
1 Eq. Ca. Ab. 174

If a second will is made on supposition of a fact which does not exist, it is no revocation of the first will. It is otherwise if the second will is made under an impression of a mistake of the law. The fact of a second will omitting is not of itself a revocation.

Hard 37-1
3 Mod. 98. Salk 592
Comb. 90
1 Show. 587 —

If a second will is made, different from the first, & the second is afterwards cancelled, the first remaining uncancelled, is revived by the destruction or cancelling of the second. If in the second there be a clause expressly revoking the former will, the former is not revived by a revocation of the latter. Sed quere if there is any distinction in principle between the two cases. See cases in the margin

4 Burr. 2512
Cowp. 49 53
Cowp. 97.

If one makes a will & afterwards marries & has issue it is, in some cases, a revocation of the will. The rule is said to be, that if the will is a total disposition of the heir marriage & issue shall revoke it. The principle is, that if the disposition in the will is such, that it must be presumed that the intention of the testator was to have so disposed of his estate & left his family without such a provision, the will is revoked.

10 Ph. Wm. 304
4 Burr. 2182
Dang. 35
1 Eq. Ca. Ab. 413

If a woman makes a will and afterwards marries, the will is void, if the wife dies before the husband; but if she survives the husband the will is good

2 Pop. 61
Plowd. 363

Devise Revocation of

1 Ves. 105 — If one makes his will and afterwards becomes insane, his will has effect. But a change of circumstances, such as affords a reasonable presumption, that the disposition in the will is not such as the testator would have made if he were of sound mind, Mr R thinks ought to be a revocation of the will. If a change of a testator's circumstances is so material that it cannot be rationally supposed that he would make such a will under those circumstances, such change is a revocation.

Moor 429 — Bapt. 108 — 1 Roll. 615 — 1 Ves. 178 — A clear intention in the testator to alter his property devised is a revocation of the devise. See cases in margin.

1 Roll 614 — 4 Mod. 14 — 10 Mod. 27 — 3 Atk 72 — 1 Roll 614 1 Ves. 444 — 2 Atk 325 — 3 Lev. 108 — 3 Atk. 803 — is totally disregarded

An actual alteration in the property devised may be a revocation of a will, the clearly contrary to the testator's intention, that the alteration should be a revocation. But this is when there is an actual alteration in the testator's estate after making a will

That class of cases, in which the devisor makes a second devise, which second devise does not take effect thro' incapacity in the second devisee, or for other reasons M. 62 seems to be the opinion is not decided according to strict principle; the principle being to follow the intention of the devisor, which, from a second devise, is taken to be, that the first shall not take effect, even if the second cannot.

If an equitable estate be devised & afterwards changed into a legal estate, it is no revocation of the will, but if after a devise of a legal estate, the devisor changes it into an equitable estate, it is a revocation.

3 Ld Wm. 170
1 Wils. 311

If partition of land held in common, after a devise of them is not a revocation of the will. Quere if coparceny & joint tenancy is not the same.

3 & 4 Wm. 70 M.
2 Ray 2.10
1 Ld. 90 contra

If land is disposed of by will & afterwards mortgaged the mortgage is a revocation pro tanto only; & yet legatee the devisee shall have benefit of the testators personal estate to disencumber his lands; unless it appear to have been the testators intention that the devisee should take the estate cum onere.

1 Vern 329
Salk. 158
2 Ld Ray 968
2 Ld Wm 329

Devise — Revocation of

If after a devise in fee, there be a mortgage of a term out of the estate, the devisee may discharge the estate of the term by a redemption of the mortgage.

3 Ven. 158

If after a devise a mortgage of the same lands is made to the devisee, it is held a total revocation, on the ground, that the mortgage clearly manifests the testator's intention to revoke. Ed quere de hoc —

Rev. in Ch. 514

A disposition of an estate for a particular purpose is a revocation of a prior devise of it pro tanto; & if the land be conveyed to trustees to be sold to raise money for a particular purpose the surplus of the avails of the sale, after the particular purpose is answered, belongs to the devisee

2 Atk. 272

Rev. in Ch. 32

3 Ld. Ken. 214

Creating a less estate out of a greater estate, which has been devised is a revocation pro tanto & not a total revocation.

6 Coll. 616

Ro. Ow. 2?

Vide Cooper 90 an expression of Lord Hardwicke's relative to a second devise; disposing of a less estate than was given in the first devise.

Cooper. 90

Devised Revocation of

If lands are devised & afterwards a lease is made of them to the devisee, the lease to take effect on the death of the lessor, it is a total revocation. Quere, if the lease be for a short term, whether it shall not in all instances, such evidence of the testators intention to revoke, as to be taken for a revocation

as Jac. 19

Of Revocation by Eng. Stat.

By Stat. it is declared that nothing shall be a revocation of a will, but cancelling, burning, tearing, obliterating, a second will, or a writing expressing a revocation, signed in the presence of three witnesses.

A second will executed on the Stat. requires a written revocation to be made but not executed on the Stat. requires a will to be executed, was held to be no revocation.

1 Ld. Raym. 346
Cowp. 52
2 Black. 1043
3 Ld. Raym. 848
3 Mod. 258
1 Show. 89
Cowp. 812

Testimony may be admitted to shew, that the cancelling, tearing, burning, or obliterating of the will, if the will is not totally destroyed, was not with intent to revoke. So if the tearing burning &c be doubting, testimony may be admitted to shew the intent with which it was done

Of Republication.

Republication is for the purpose of reviving a will which has been once revoked: or for giving a will of a prior date the operation & effect of having been made at the time of republication.

With respect to republication, whether expressed or implied there is no difference in the law of Eng & C.

A will revoked for the purpose of giving it the effect of having been then made, is to be taken & construed to speak all the property, & to be in all respects the same that the same will would speak if originally made at the time of republication.

1 P. Wms 275
Cro. Eliz. 699
9 Eid. 178
Comy 381.

A devise to one & his heirs is lapsed by the death of the devisee prior to the devisor, & the heirs of the devisee can take nothing. A republication subsequent to the death of the devisee does not enable the heirs to take.

Prec in Ch. 120
Sid. 318
1 Vent. 341

N.B. does not think the case in 3d of Atkyns was decided according to fear principle.

3. Atk. 715

Devises - Republication &c

A declaration of the testator signifying his intention to republish, if done animo republicandi was at Lon, law a republication. The same would be in a republication of a will, disposing of nothing but personal property.

A republication, to give effect to a will disposing of ~~personal~~ real property must be in writing & executed in the same manner as the will itself.

A will made by an infant, is rendered a good will by a republication after the testator is of full age

1 Ped. 162

The destruction of a second will, if such second will contained a clause expressly revoking the former will, is an implied republication of that will

A codicil executed according to the Stat of frauds & disposing of real property, & annexed to the will, is a republication so if the codicil be on a piece of paper separate from the will expressly referring to the will. But it is questioned whether a codicil identic with regard to the will, tho executed according

3 Atk 180
Geo. Eliz. 498
Cowp. 381
1 Ves. 457-459

to the Stat is a republication. The reason of the distinction between a codicil annexed to a will, or if separate from the will, expressly referring to it, & a codicil separate from the will & silent with respect to it, is that in the two former cases, it appears, that the testator read the will in his mind when he made the codicil, & in the latter this does not appear. Mr. R. thinks this a fallacious distinction. A codicil necessarily implies a will, & it is equally evident, that the testator read the will in his mind in the one case as the other.

It is also questioned whether a codicil disposing of personal property only, tho executed according to the Stat, is a republication. It is the opinion of Dr Hardwicke that such codicil is a good republication.

Mr. R carries the matter still further & is of opinion that a codicil not executed according to the mode required of a will of real estate, & disposing of personal property only is an implied republication —

Of Parol Testimony affecting Wills.

2 Bozm. D. 477 &c
Hawg. 126
Salk. 240
10 Jac. 45
5 Rep. 68
2 P. Wm. 156
2 Ves. 217
Ves. 69
2 Mar. 55
Ved. 248
2 Ves. 216
2 Ves. 231
Salk. 7. 1 Eth. 186
1 P. Wm. 674

It is a rule without exception that parol testimony of any declaration of the testator to enlarge, explain, restrain, or contradict any word of the will cannot be admitted. If there be an ambiguity on the face of the will parol testimony is not admissible to explain it. But if the face of the will is free from ambiguity, & ambiguity arises from circumstances dehors the will, parol testimony may be admitted to explain.

2 Ves. 240
2 Ves. 410
1 P. Wm. 162

If a person be mistaken in a will parol testimony may be admitted to shew who was intended; & if the person be described, so as to be known or is good in a will, tho not in a deed.

Hawk. 165
2 Ves. 226

Notwithstanding the rule that an ambiguity arising on the face of the will cannot be explained by parol testimony, if there be an equivocal term, used in the will parol testimony of the testator's intention may be admitted. For a trusty is a sentence with two constructions equally well

If the testator has explained in what sense he has used an equivocal term, in one part of his will, he shall be taken to have used it in the same sense in other parts.

3 Reb. 19
Ver. in the
6 Rep. 6
2 Roy. 831
1 Brown Ch. 472

The circumstances of the testator's family may be proved to shew the intention of the testator in the will.

Testimony may be admitted to prove declarations of the testator, or other matter for the purpose of rebutting an equity or an implication of law. When the construction of a will is different in Eq. from the legal construction, this construction of Equity is called an equity, & testimony is admitted to shew the testator's intention, that the legal construction should be given.

But fraud testimony will not be admitted to shew an intention in the testator, that the construction of Eq should be given to a will which would otherwise have a legal construction

1 Ves. 323

Parol testimony may be let in to shew that a legacy was given in pursuance of an agreement, which agreement has been fulfilled since the will was made

2 Burn. 506
Moo. 556

Parol testimony may be introduced to shew fraud in obtaining the will.

Of Jurisdictions of Courts with respect to Wills.

Courts act immediately in the diocese, & perhaps not bind the hands of Exrs & Exors to a will, so far as respects devises, are unnecessary. Yet in Eng. it is necessary to prove a will, disposing of real estate only, & yet stand the probate is negatory, & Stat. of 1 Ed. requires that all wills be proved before Ord. of Probate; but the judgment of that Ord. is not conclusive, & an appeal may be taken to the Supr. Court.

The Ord. will not interfere to set aside a will for fraud or for insanity in the testator. The reason Mr. R. suggests, that the Ord. will not interfere to make void a will for fraud is that such adjudg. of Ord. is unnecessary, as the fraud may be taken advantage of at law.

1 Ch. Ca. 58
2 Ver. 188
2 Ch. Cas. 270
2 Atk. 284
3 Atk. 1, 5 Ver.

Notwithstanding the above rule of the Ord. they have set aside certain supposed frauds in Ord. in Ord. h. on a will

1 Ch. Cas. 288

# of Proving Wills.

1 Ch. Abr. 341
1 Wms. 216
1 Ves. 177

If one subscribing witness testifies to the execution of the will by the testator, & the attestation by himself, & the other two witnesses was in the presence of the testator, it is in a Court of law considered sufficient to prove the will; but in Eq all the witnesses must be examined, if they can be had. The practice of the Eq Ct is adopted in C.

1 Black. 355.
1 Bur. 222.

Witnesses may be admitted, contrary to the rule in all other cases, to disprove the testimony of the subscribing witnesses to a will; & subscribing witnesses may contradict their own attestation. Id quere de hoc.

The probate of a will being in Eq of no authority, as it ipsuts devises, the original will itself must be produced, in C. ~~original~~ copy answer the purpose of the will.

1 Roll 909
a 809
a 259
Ro. 626.
Ca. Eliz. 333

It is a rule of the com. law that a devise of the same estate to an heir, which he would take by descent is void; & the heir shall take by descent notwithstanding a devise.

Wills - Revoking &c.

By the law of N. it is immaterial whether the heir be considered as taking by devise or descent, except in case of a posthumous child, when if the devisee takes by descent the child has a share, if by devise he is excluded.

If the heir at law disposes the devisee for the purpose of defeating the devise, the will interpose & give effect to the devise.

6 Bell. 371

If there be a devise of lands to pay debts, & nothing more of the testator's intention expressed, the devise is considered as a provision made in case of insufficiency of personal effects to pay debts, & the devised estate is not to be applied till the personal effects are exhausted. But an express intention of the testator that the lands devised should be first applied, will exempt the personal fund.

3 Vent. 349
1 Atk. 322
1 Wils. 82
2 Burr. 183

Under the laws of N. all property all property is liable for debts; first the personal, & then the real estate.

From the cases in the books it is left to doubt whether the intention of the testator is the principle, which governs in applying first the personal estate to pay debts where there is a devise of lands for that purpose. If the testator's intention is the governing principle, the decisions of the Eng Cts are applicable in this country; & the same expressions with the same degree of explicitness are necessary to shew the intention of the testator in one country as in the other. The true principle Mr R. conceives to be an inclination in the Eng law to favor the heir. Our laws have no such partiality to the heir; & the reason of the construction guiding, the construction itself fails & a different one may be given. Let it be given — If there is not a difference in the two countries. In this country lands as well as personal estate are charged with every species of debts; & if a devise of real property to pay debts does not charge the lands beyond the extent of the devise is without effect; but on Eng according to the construction given to such a devise, the devise serves to charge the land with debts, with which it would not otherwise be charged

1 Salk 154
2 Vern. 411

If one devises lands to pay all his debts, such debts of the devisor as are barred by the Stat of limitation should be paid. This M.R. thinks evinces, that the principle upon which debts are barred by Stat is not, that the length of time then limitted is evidence of payment.

In Eng a voluntary bond is postponed to all creditors, but preferred to those of legatees. Under our Stat for the settlement of insolvent estates a difficulty arises, if the estate be more than sufficient to pay all the debts, & insufficient to pay all the voluntary bond debts. If the voluntary debts are allowed, the claims of creditors for valuable consideration can be but partially satisfied; if rejected, it is said, that they must be totally lost. M.R. thinks such creditors should, under our Stat as in Eng be allowed their claims after other creditors are satisfied.

2 Vern. 247. 425
259 contra

If lands are devised for a special purpose, the surplus if any, after the special purpose is answered, is a resulting trust for the heir. By the laws of C. such surplusage generally depends to the same person, who is entitled to the personal estate of the devisor.

3 Wm. 195 — Terms of a legacy be given to an heir at law the word heirs is not a superfluous word.

1 Atk. 110 — Infants, idiots, persons of non compos mentis may be some cases may be devisees. So may illegitimate children, if described by a name of reputation, but cannot take under the name of the children, issue, or the like of any person.

2 Lev. 36 — An alien may be a devisee & holds the estate devised, till office found of the devisee of his being an alien.

1 Wms. 529

2 Ves. 360 — A child in ventre sa mere takes by devise to him in words of the present as well as of the future tense, unless it appears to be the testator's intention that the unborn child take immediately.

2 Bro. 88
2 Mod. 8
1 Wms. 605

A devise to the posterity of one has been held a sufficient description, to enable the person to take by the devise.

1 Ves. 335 — A nearest relation of the name is a good description of a devisee; & under such a description all the testator's relations of equal degree shall take.

1 Wms. 229 — The term heirs, when used for the person or persons that shall inherit the estate of a person living, when such person shall happen to die, is not a good description of a devisee; but if used to designate a person or persons who would inherit the estate of one now living, if such person were now dead, it is a sufficient description of a devisee.

1 Bro. C. Ca. 189

Execution

In the Eng. con law three kinds of execution were known. viz. - the levari facias - the fieri facias, & the capias ad satisfaciendum.

But in no case did the levy of an exn. on a judgmt in a personal action vest in the creditor title or fee of the land, except the case of an execution against land in the hands of the heir.

3 Reep. 11.
Co. Lit. 394

The capias ad satisfaciendum is an exn. agst the body, & could originally be had only on a judgmt for a tort. By a fiction this action is now had in all cases, the pltff complaining in his writ of a trespass vi et armis, & then declaring on a contract. The execution follows the writ and not the declaration.

A levari facias or li. fa. is an exn. against the goods & chattels & lands of the debtor. If it be levied on the land it entitles the creditor to the rents & profits only of the land, & does not invest him with a fee. Rent may be taken by this exn. So entitle himself to the rent the creditor must levy the exn upon the land, which levy substitutes the creditor landlord in the place of the debtor & the tenant must pay to him the rent. When goods are taken they are to be sold in such manner as the officer sees fit, the law not having prescribed the manner of the sale. Not so in Con. The St is very particular in prescribing the manner of selling personal property.

3 Reep. 11
8 Coke 146

Stat. B. 174

A fieri facias or fi. fa. is an ex. against the goods & chattels only. Goods when taken on a fi. fa. are to be sold as if on a levari facias. There must also be a sale of emblements taken on a fi. fa. But emblements taken on a fa. fa. are appraised to the creditor & vested in him.

Salk 368

A term of years may be taken on a fi. fa. but does not vest in the creditor, & is to be sold as it may be extended.

8. Rep. 171

By a stat of Westm. an elegit was given which may be ~~taken~~ levied on the personal estate of the debtor. Personal estate is taken in appraisal to the creditor. It may also be levied on one half of the debtor's real estate & the lands are in such case extended to the creditor. But this levy vests not the fee of the land. A subsequent stat provides, that all the lands may be taken & extended.

The law of E. gives but a single ex in all personal actions. There is a right to the goods chattels lands & body of the debtor. Personal estate is to be taken in preference to real; & if personal estate is turned out to the creditor he may not take the body. If personal estate is not to be found, the creditor has his election to take the lands or the body.

Stat. Book 174

Q. Estate by Execution

By the Stat. of C. a levy of ex" on land vests the fee of them in the creditor. But lands the fee of which is in the debtor are the only lands mentioned in the Stat.

Stat. B. 174

The Stat provides that goods & chattels taken on ex" shall be sold & sold at the post. Upon this part of the Stat a question has arisen concerning what is to be done with emblements growing on the land or other estate which cannot be brot to the post. Whereon Stat fails of having made provision, N.B. that the com law of Eng is to be followed.

If one seised in fee has made a lease of his lands, the creditor can have no remedy by any provision of the Stat of C. against the lands; but he may levy on the rent and entitle himself to the reversion, which, if the lease be for a long term, can be of little value.

N.B. that the law of Eng. may be resorted to, in this case, & the creditor by a levy of his execution become the landlord & take the rents.

If the debtor sole estate is a lease for years, the Stat has made no provision, by which estate can be subjected to the payment of the debt.

The same is true of an estate for life. A practice has obtained of extending in this case.

It is questioned whether the heirs & interest in the lands of his ancestor is subject to the payment of his debts. Mr. R. sees no reason why it should be.

It is doubted whether money can be taken on exec. There has been one decision by a divided Court that money may be taken. Mr. R. opinion is opposed to this decision. He has found no decision in the Eng books directly in point & the only decision at all in analogy is one that a bank bill cannot be taken.

Harder 53.

It has been questioned whether by the laws of L. the levy of a fi. gives a right to enter upon the lands, or whether it gives him no more than a lien. It has been decided that the creditor acquires no more than a lien, & not a right to enter into possession.

When lands have been devised to be sold, & no one appointed to sell, it has been a question who should make the sale. In such case the sale will be directed to be made by the heir & exec. in his stead.

1 Atk. 420
1 Ld. 304

Of ex.n to recover real estate the title of which is in him who obtains the ex.n.

This ex.n is to give possession to one who is wrongfully kept out of possession of his own land. But a claimant of land, having obtained a judgmt in his favor, is not obliged to take out ex.n, but may enter upon the land without it.

Then ex.n requires the Sheff to remove all obstacles in the way of the owners enjoyment & put him onto possession. If the Sheff find another in possession, than him & agt whom he has an ex.n it is the Sheff's duty to remove him out of the way. To execute such ex.n the Sheff may break doors, if there be need.

By the Eng com law a judgmt was a gen. lien upon the lands of the debtor at the date of the judgmt which was the first day of the term; & if the debtor alienated them after that time they were still holden by the debt. By a Stat of Car. it is provided that the lands shall be bound only from the time of judgment actually rendered.

1 Roll 89 2
Cro Eliz. 174
Cro. Car. 149
Cro. Eliz. 181

An Ing Stat binds the personal estate of the debtor from the time of ex.n sent into the hands of the officer.

In C. a writ of attachment may be sued out & the real & personal estate of the Deft attached, & holden to answer such judgmt as may be recovered; & property thus attached cannot be disposed of by the owner, but remains in the hands of the officer till the judgmt recovered is satisfied.

It is an opinion that an attachment is not such a lien upon the property as that the whole debt of the Pltff shall be satisfied, if the Deft dies insolvent before judgmt recovered & satisfied. Mr. P. doubts this doctrine.

If an ex.n be agst two & one dies before it is levied, it is by the rules of the com law to be collected out of the survivor. But if satisfaction cannot be had agst or out of the survivor remedy may be had agst exr.s of the deceased.

Ex.ns to recover Real Estate

If exn be agst several the creditor may levy it on either; & the debtor of whom the whole has been collected, may compel the others to reimburse him

If one debtor die after judgmt & before execution, execution may be taken out agst the survivor, but it is necessary to suggest on record the death of the deceased debtor.

If after judgmt & before exn the debtor die no execution can be issued against him; but the creditor may have a scire facias on the judgmt agst the exr & then he may have exn agst the exr. If an exn has been issued before the death of the debtor the officer, unless the exn be a ea ea may proceed to levy on the property of the deceased But in o the way law would be infringed by permitting exn to be levied after the death of the debtor.

1 Roll. 895.

If the creditor dies after exn issued, there is no objection why the officer shd not proceed to levy except that of form "that the exn requires that the money be collected & paid to the Plff" which cannot be literally done after his death. Mr. R. thinks this objection of no weight & that bail must to the exn is sufficient to the Plff to answer the law.

In many cases which happen the levy of an exn fails of producing any satisfaction to the creditor. When this happens, it is the practice to obtain a new exn. Tho' in many of these cases Mr. R. supposes the 2d exn might be proceeded with. Such is the case when an exn is levied on a privilege person, or one who has a protection, when a prisoner escapes. When a prisoner escapes & there is danger that he will abscond before a new exn can be obtained, it is usual to retake him by a copy of the exn.

Latch. 194
1 Roll 903

When a prisoner dies his body can be no longer returned; & the creditor, if he will levy on the goods or estate of the deceased debtor, must obtain a new ex.n"

5 Dec. 87

If an ex.n has been levied on property not the debtors, there must be a new ex.n.

If one of two judgments obtained against two persons for one & the same cause has been satisfied, & the creditor proceed to take execution out on the other judgment & levy it on the other debtor, this debtor has his remedy by an audita querela. His officer is not liable in this case.

An audita querela is the remedy a party who has been levied upon after a discharge of the judgment by the creditor. And if the debtor produce such discharge to the officer, he may still go on to levy his ex.n, not being obliged to take upon himself the hazard of the discharge being genuine.

Doors may be broken to levy an execution in a civil action, to execute an original process, to attach a prisoner who has escaped, & to take a man secret use in the house of another. But the doors of a house may not be broken, in a civil cause, to arrest the body of the owner.

5 Rep. 91
Cowp. 1.

It has been questioned whether a man may protect himself in his shop. Mr. R. thinks nothing will protect a man but his domicilium.

Mr. R. supposes that if there be an unlawful breaking to arrest the body the arrest is void

Cowp. 1.

# of Alienation by Deed

A man may not sell lands of which another has the possession & which he claims against him. There is this exception that he may sell to him in possession. If one sell lands so circumstanced, it is a crime, which the law punishes. Such sale was a crime at com law, and the Stat of Henry 8th was made in affirmance of the com law, & increasing the punishment annexed by the com. law. The Stat of L. is almost a literal copy of the Eng Stat.

Plowd 88

Co. Lit. 369

It has been said that if the person out of possession enter he may convey. This being admitted the whole intent of the Stat may easily be defeated

Estates of which there can be no present possession are not within the purview of this Stat.

4 Mod. 182
1 P. Wm. 17.
Strang 182

Executory devises & possibilities are contingent interests are devisable and descend, but it is questioned whether it can be sold; & so seems to be the law

One attainted of treason cannot convey his lands, & his disability is from the commission of the crime. The reason of this disability is, that by the commission of the crime the estate is forfeited, & become the property of an other. So the disability of Idiots & lunatics in contracts.

A conveyance made by one under duress may be avoided by him.

By the laws of Eng a feme covert may make a conveyance of her own estate by a fine which will bind herself, her heirs & her husband, if he joins her in fine. If the husband does not join, but acquiesces, doing no act to avoid it, the fine binds the wife & her heirs But the husband may disagree to the conveyance such disagreement defeats the conveyance in toto; for the conveyance cannot take effect immediately, because of the husbands interest, & the law of Eng will not suffer a freehold to commence in futuro

Alienation by Deed

As the law of C. suffer a freehold to commence in futuro, Mr Q. thinks that a feme covert may convey her property without the consent of her husband; but not so as to deprive him of his interest in the property. This would be an infringement of the rule, that a feme covert can do such acts, & such acts only, as do not affect the marital rights of the husband.

A feme covert may be a purchaser; but the husband may defeat the purchase by a disagreement. So may the feme covert after the coverture has determined, avoid the contract, or her heirs may do it, unless the survived the husband, & affirmed it, after her coverture determined.

An alien may be lessee for years of an house for the purpose of merchandizing.

Of a Deed.

A Deed must be written or printed, it is said on paper or parchment, and in Eng. sealed. The formality of sealing in U. may be dispensed with. It ought to acknowledge a good or valuable consideration. If mention of any consideration be omitted parol testimony may be admitted to shew an actual consideration

If a deed acknowledge a consideration no testimony can be admitted to shew that there was no consideration But to shew an alleged consideration testimony may be admitted.

If there was in fact no consideration, & the deed acknowledge none, the grantee, Mr B. in his person is vested with the legal title, & holds in trust for the grantor as in Eng before the Stat of uses did a grantee in trust for the grantor.

The want of a consideration when a consid. is acknowledged cannot be proved by the grantor, yet it may be proved by a third person who is a creditor to the grantor.

of a Deed

The parties may shew that the actual consideration was greater, less or something different from that which the deed mentions as the consideration.

7. Rep. 80a

It is a gen rule, that a voluntary conveyance is void as to creditors whose debts are prior to such conveyance. This rule is founded on the greater equity in the creditors case, than in the case of the voluntary grantee; and the presumption of fraud arising from the nature of the conveyance when it operates to defeat the claim of creditors. If the circumstances of the case are such as to remove all presumption of fraud to defeat creditors by the conveyance, & the creditor is chargeable with any degree of negligence in collecting & removing his debt, the voluntary grantee shall not lose his hold upon the estate in favour of creditors. Mr. D. supposes that no presumption of fraud, & want of due diligence in the creditor must both concur to postpone the creditor to one who holds by a voluntary conveyance

Fraud

No presumption of an intention to defraud a creditor, who becomes a creditor after the conveyance can possibly arise. A voluntary conveyance is therefore, not to be avoided in favour of such a creditor. It is, however, questioned whether the conveyance is not void, as to subsequent creditors, if made for the purpose of defrauding prior creditors. But the policy of the law to discourage such conveyances by making them valid as to the grantor, & by precluding them from any advantage from an estate so disposed of, may be defeated, by admitting a subsequent creditor to claim against a grantee in such cases

Parol leases for three years or less than three years are in Eng, in some cases, good. In C. the Stat makes void all leases by parol.

Of the Parts of a Deed

1. The premises are the first part of a deed, & are a description of the grantor & grantee, the consideration for the sale, & a description of the lands to be sold & conveyed as to the quantity situation & boundaries

If the land be described as lying within specified bounds, the grantee takes all land included within those bounds, and not more nor less; & if the number of acres within those bounds, falls short of the number mentioned in the deed, the grantee has no claim against the grantor on account of such deficiency.

So if the description be by courses & distances, the grantee is entitled to all comprehended within those courses & distances; & it is immaterial whether the quantity of land or number of acres be greater or less than that mentioned in the deed.

But if fraud or deception has been practised, an action for the fraud may be had.

The parts of a Deed

If the land be described to lay in a plan mentioned & extend in a certain direction till a given number of acres is included, the grantee is entitled to the given number of acres & not more or less. And if the grantor's land does not extend so far as to make the number of acres, he is answerable to the grantee for his deficiency.

2 The second part of a deed, is the tenendum or the quantity of interest which the grantee is intended to take. If the quantity of estate be given in the premises it cannot be enlarged or curtailed by the habendum; but if the interest given in the premises be not clearly & accurately defined the habendum may serve to explain what interest was intended in the premises.

The tenendum is in this country useless & unmeaning

The parts of Deed

3. The covenants of seisin & warranty are another part of a deed. Covenant of seisin is a covenant that the grantor is the owner of the land and has a right to dispose of it. The covenant of warranty is a covenant to pay all costs and damages, which may arise to the grantee by reason of a right & prior claim by another to the estate which the grantor undertakes to convey to the grantee.

If the grantee finds that the grantor was not well seised he may immediately bring his action on the covenants of seisin, & need not wait till he is evicted. It is said that in this action the defendant can shew that the seisin is in another and shew in whom it is. As there might be great difficulty in shewing in whom the title is, especially where deeds are not registered, it is doubtful the necessity of shewing more than that the seisin was not in the grantor.

No action can be had on the covenants of warranty till eviction. And when a suit is brought agst the grantee to evict him, he ought to entitle him to all the damages & costs, which may be recovered on the covenant of warranty to give notice to the grantor of the suit. If he neglects to give notice no more is to be recovered than the covenant of seisin.

Another consequence of notice is that the grantor, having notice of the suit, is concluded by the Judgment agst the grantee & cannot afterwards set up seisin in himself.

That the grantor has knowledge of the suit agst the grantee has been held not sufficient notice; he ought to be requested to come in & defend.

At common law the rule of damages was the value of the land at the time of the purchase.

The rule adopted in this country has been the value of the land at the time of eviction.

The Parts of a Deed.

In Eng. the heirs of the grantor if they have assets are liable on these covenants. It is questionable whether in this country, or there the heir qua heir, is liable. The reason of making a distinction between the two countries is that here the real estate is charged only when the heir is bound; in the other all the estate is liable in the hands of the ter.[tenant] for every species of demand.

In a quit claim deed there are no covenants; yet if the grantor was not seised, the grantee may recover the consideration paid. But if the bargain be a bargain of hazard, the grantor's title being known to be doubtful, the consid.[consideration] cannot be recovered back.

The addendum is a necessary part of a lease, but has now nothing to do with a deed.

1. The condition is next, if a condition is to be added.

The parts of a Deed

2 Rep. 5
Co. Lit. 6
2 Roll. 21

5. Another part of the deed is the date. this is a note of the time & place of making the deed. & if this time be a false or impossible time, the deed is not on that account bad, but evidence may be given of the true time.

2 Rep. 9.
11 Rep. 27.
2 Roll. 8

A deed must be read to the grantee if he request it & if read, & he by the deed is bad & not his act & deed

Co. Lit. 6
2 Roll. 23

6. In Eng a deed must be sealed. In C. it is doubtful whether this formality is necessary.

It is requisite to a deed, that it be delivered, & the delivery is the true time of its making.

Co. Lit. 35

Parol testimony may be admitted to contradict the date appearing on the face of the deed. The rule which Mr. Ch. J. draws from the cases, of distinguishing when testimony is to be admitted & when not is, that if the equity of the case requires that the real date should govern, testimony is to be admitted to shew the real date; if the equity of the case requires that the appearing date govern, whether the appearance be the true date or not no testimony is to be admitted to shew any other than the appearing date.

Delivery of a Deed

Possession of a deed is admitted in E. as presumptive evidence of delivery; but it may be destroyed by other testimony. The practice of not delivering deeds in the presence of the witnesses creates a necessity for admitting possession as presumptive evidence of delivery

It is said, that a deed cannot be delivered to the party himself as an escrow. In the books there is an apparent contradiction on this point, Mr R. thinks the rule to be, & to this rule he thinks all the cases reconcilable, that if the condition is to be immediately performed, & previously to the deed taking effect, or having been delivered the condition is good; but if the condition is subsequent & not to be performed till a future time it is a void condition, the delivery being made to the party.

Cro. Eliz. 520
885
Dyer 34
6 Rep. 137

At com law witnesses were not necessary to a deed; the Stat of Ireq requires that there be two witnesses to a deed. Acknowledgement & recording are required by the same stat, neither of which were requisite at com. law.

Will guards of a Deed

It is a gen rule, that the deed first on record takes precedence of all other deeds, tho of a prior date. In this rule all also are exceptions, when due diligence has been used to put the prior deed on record, & where the subsequent grantee had knowledge of the prior deed.

It has been adjudged that if a creditor, knowing of a former definitive conveyance, gets to himself a good conveyance of the same lands he shall add thereto. And the Ct said in that case, that no distinction was to be made between a purchaser, who is a creditor, & one who was not a creditor. Q. quere

An exception of a certain part out of a general grant, as one acre out of a manor, is good; but an exception of a certain part out of a certainty, as one of twenty acres is good

Co. Lit. 47

Hob. 170.

Alteration of a Deed

An alteration of a deed in any part, however small the alteration may be, if made by the grantee is void. If the alteration be in an immaterial part & by a stranger & not by procurement of the grantee, the deed is not destroyed.

An alteration, even by the owner himself, if not with an intent to defraud is not forgery, nor does it make the deed void.

If one wanting capacity to make a deed as an infant or feme covert, make & deliver a deed to a third person, & afterwards the person attains a capacity & the deed be delivered it is still be a void deed.

Co. Litt. 230
3. Rep. 35.

If a deed be void for want of capacity at the time of delivering it from one to another it, a second delivery be now after the maker attains capacity makes it good.

If one who has capacity to make a deed, but by reason of some impediment, as not being in possession he cannot at the time make an effectual delivery, delivers a deed as an escrow, to be afterwards delivered as his deed; a second delivery when the impediment is removed, is good.

Co. Litt. 230
Co. Litt. 230
3. Rep. 35.

But one who has not power, at the time of delivery, to make a deed effectual by reason of some impediment, delivers a deed afterwards when the impediment is removed, makes a second delivery, the deed is stillborn.

5. Rep. 23 A deed from which the seal is broken is void, but if the seal be broken
2 Lev. 220 while the deed is in the keeping of the Court the deed is not void

If a deed be made to one who has not agreed to accept it, it is made void by his disagreement.

It has been contended that the property cannot vest, till there be an agreement to accept. The truth is that generally the interest vests, before an agreement to accept, liable to be divested by a disagreement.

A deed may be set aside by
1 Ven. 318 a decree of a Court of Equity.

Of the several species of com. law conveyances

1. One species of conveyance at com law was Feoffment. This was a conveyance of a fee simple estate in a corporeal hereditament.

2. A gift is properly applied to the creation of an estate in tail

3. Incorporeal hereditaments are said to be in grant, & a conveyance of such an estate, whether of fee simple or less, is called a grant.

4. If an estate less than a fee simple or fee tail be created in a corporeal or incorporeal hereditament, as an estate for life or years, it is called a lease. To create an estate in fee simple, fee tail or for life in a corporeal hereditament, livery of seisin was, at com law, indispensible.

5. Exchange, which was gift of one estate for another, both equal in quality, tho not necessarily equal in value; i.e. that is both estates in fee simple, in fee tail, or both lease for an equal number of years.

6. A release is when one having a greater estate releases it to him who has a lesser or reversion.

7. A surrender is when he, who has a less estate hands it to him who has a greater estate.

8. If one having a lease disposes of all his interest it is called an assignment.

These species of conveyance are now all out of use, & have given way to two species of conveyance, founded on Stat of Uses called a bargain & sale; and a Lease & Release

The Doctrine of uses was first invented by Ecclesiastics to evade the Statute of mortmain; but was afterwards made to answer more valuable purposes. See the history of the law of uses. 2 Black. C. 327

A conveyance by bargain & sale is a real contract in which the bargainer, for a valuable consideration, covenants to convey to the bargainee; & by such bargain becomes seised to the use of the bargainee, & being thus seised to the use of the bargainee the Statute of uses vests the legal estate in the bargainee, & thus completes the purchase.

The conveyance of a lease and release is effected, by a lease for one year made by the tenant of the freehold to the lessee; by which lease the lessee becomes seised to the use of the lessee for the term of one year, & then the Statute of uses vests the possession in the lessee, who now becomes capable of taking a release from the tenant of the freehold, whereby enter to the lessee a release of his interest in the lands; & thus the purchase is completed. For conveyances by fine & common recovery see 2 Black. Co. 348 &c.

2 Black. Com. 338

Of title by occupancy.

By the com. law of Eng. no owner is appointed to real property, so that it can only in the case of the death of one, who has an estate for the life of another, before the death of him, for whose life the estate is held, be open to the first occupant. Nor is the residue of an estate pur autre vie without an owner, except when the grant is to the grantee simply without naming his heirs, ex^rs or any one to take if the grantee should die before him for whose life it is granted. By a Stat. of 29 Car. 2. & by another of 14 Geo. 2 it is provided that the residue of an estate pur autre vie, after the death of the grantee, shall be assets in the hands of the ex^r or adm^r to pay debts & distribute among those entitled to the personal estate of the tenant pur autre vie.

In U. S. this residuum of an estate for the life of another is disposed of by no Stat. It may be devised under the Stat which gives power to all persons, having any interest in lands, to devise it. In other respects it is as at com. law unless our Leg. should adopt the provision of the Eng. Stat.

Of islands rising in the sea or rivers, or the alluvion or the deduction of the water

2 Black. Com 260 See 2 Black. Com. 261

In some countries the soil of rivers & bays is assigned to individuals, & is private property; the soil of large rivers & the soil of coves of the sea is public property, & not appropriated to any individual.

The title of land may be changed from one to another by forfeiture for the commission of crimes. In this country there are no laws creating forfeiture for crimes.

In by lands conveyed to an alien go to the crown.

By the by laws tenant for life or years forfeits his estate to him in reversion, by attempting to convey a greater estate than he had in the land. This was founded on feudal reasons, which do not exist in this country.

Of Remedies for Injuries done to Real Property

Of Trespass

An entry by one into the house or on the lands of another is a trespass for which an action will lie. If the entry be for something more than convenience, to do some act, which the person entering has occasion to perform, as to pray a doctor or take away his own property, it is no trespass. If, however, the injury of the entry be such that more than nominal damages would be given, an action of trespass would lie

One may be guilty of a trespass by an entry of his cattle, or of cattle in his keeping, upon the lands of another. If the cattle enter thro, the fence of the owner of the land, & that fence be an insufficient fence to prevent cattle in general, trespass would not be maintained. But if cattle not allowed common at large in the highway break into the land of any one, from the highway, the owner of the cattle is liable for the damage done, however insufficient the fence might be thro which the breach was made.

Trespass

If damage is done by cattle in the keeping of one not the owner of them, the man who sustains the injury may elect to take his remedy agt the keeper or owner.

The man who trespassed upon may take his remedy by an action of trespass, or by taking & impounding the cattle, but he cannot have both remedies.

When the cattle are taken they may be retained till the damage is satisfied. If the quantum of damage cannot be agreed upon by the parties the cattle may be taken from pound by a writ of replevin, which brings the matter before the Ct., who will decide whether the taking was wrightful, if that be questioned and assess damages.

2 Roll. 553 One not in possession, at the time of the trespass committed, cannot maintain trespass. But any one in possession, claiming to hold the land may trespass agt a stranger.

Ms. Notes

A disseisee can have trespass before entry against the disseisor for the disseisin; but for any act done after the disseisin he can not have trespass before entry. After entry the disseisee may have trespass, not only for the disseisin, but for all the wrong of holding from out of possession, & the injuries & trespass done by the disseisor or any other person between the disseisin & the entry of the owner.

Co. Lit. 257

2 Roll. 553

It is questioned whether the disseisee can after regress, have trespass against one to whom the disseisor conveyed or leased. The law seems to be that the disseisee alone is liable.

2 Roll 554

11 Rep. 51.

As to the necessity of an actual entry & possession before trespass can be maintained, the law of C differs from the law of Eng. The law of C. considers every one, who has a right to the possession, claiming against the real owner, & where there is a vacant possession, the right that owner is always so in possession, that he may have trespass for the injury done to the lands, whether he had ever been in the actual occupation of them or not.

Trespass

Trespass cannot be bred agst tenants for life or for years, but it lies agst tenants at will.

This action lies agst every one aiding & assisting in the trespass as well as agst him who actually committed it.

Tenants for life or for years is liable for wrongs committed by himself or another. He may have trespass against any one who commits a trespass in his estate. The lessor may have trespass, if he pleases, the possession of the lessee being considered as his possession for this purpose agst a stranger; & in this case the lessee is not liable for the injury done.

In this action the title to the land may be tried.

If in an action of trespass, but before a question of the Plaintiff's title to the land is pleaded, the justices of the D. cannot proceed to give judgment. In such case the justice takes a bond from the Defdt (which is always a bond of 20£) to prosecute his title. This provision is made by a stat. of C.

Messrs

The mode of proceeding with accruing to the bond as penalties, is to take a copy of the justices record of the case & enter the action in the County Court. This mode cannot be pursued, if the action of trespass be brought in a County, not the County in which the land trespassed upon lie. An action must in such case be brought against the Ob.ee in trespass, & the title of the land tried

If this bond be forfeited by a neglect to perform the condition by pursuing the title pleaded, the whole sum of the bond will be recovered

Of an action on the case for a Nuisance

Nuisances are public & private. For a public nuisance no individual can have an action, unless he has sustained a special injury.

At com law a writ was sometimes is sometimes taken for the purpose of abating a nuisance, or an abatement might be without ~~action or~~ writ. The writ is now out of use & a nuisance may be abated, if a public one by any individual of the public, & if a private one by the individual annoyed.

But it is no justification for a breach of the peace, that it was done in abatement of a nuisance.

If one enter upon land of another to abate a nuisance, it is no trespass.

If an action on the case for a nuisance, all damages sustained at the date of the writ are recovered; & if the nuisance be continued, a new action may be had for the further damage, which arises.

Nuisance in the Civil Law & Nuisance

If one builds, so as to overhang another, & cast the water from his eaves to the injury of the other, it is a nuisance. In like manner it is a nuisance to obstruct the ancient lights of one's house; to corrupt his water, or deprive him of the use it, by stopping or diverting its course, or corrupt the air about the dwelling of any one, so as to make it unhealthy or offensive, by erecting in the neighbourhood any thing which produces such effect.

9. Rep. 58
no. Car. 510

Of Waste

No one not entitled to the inheritance, can have an action of waste; nor can it be maintained against any other than a person entitled to the inheritance.

The damage recovered in an action of waste was, at common law, no more than simple damages, by. But the Statute of Gloucester, double damages are recoverable.

Waste may be committed on houses land or timber, & is either voluntary or, involuntary.

By the law of Eng the tenant is obliged to keep the building in as good repair as the same were in, unless, in his covenant with his Landlord, he is exempt from that duty. Mr Powers thinks this may be treated to this country.

Tenant may cut timber for repairs without committing waste. But if the repairs are necessary by his default it is waste in the tenant to cut timber to repair them.

Co Lit. 53.

Pow. 191.

It is waste to pull down a building in order to build a new one; to build a new house where there was none before; to change a building of one kind into a building of another kind?

Waste

It is waste on lands to permit dikes to go to decay, to turn plow land into meadow &c to dig to open new mines.

2 Mod. 193
2 Mod. 181.
2 Roll. 816

To cut trees, which are for ornament or shade is waste.

If a lease covenant to repair, it is to be understood, that he has liberty to cut timber for that purpose. And if the lessee covenant to repair it is not waste in the lessee to make the repairs himself.

Moor 23.
Co. Lit. 54.

When it is intended that the lessee should cut the timber & clear the land, it is usual to insert in the lease, "without impeachment of waste." This, however, now amounts to no more than a sale of the timber; and does not exonerate the lessee of the commission of waste. Nor does it extend to trees for ornament or shade

Co. Lit. 54
Co. Jac. 588

He also has the inheritance, can have no action of waste against the tenant, if a freehold estate intervenes between their two estates.

The tenant has a right to wood for fuel, but if he cut green timber for sale, which then is dry, it is waste

Mr Power thinks that it would not be considered waste to cut timber & clear the land on a new farm in this country, where it is necessary to clear the land for cultivation, & that the tenant might receive benefit from the estate.

The Eng Stats relative to waste, which are ancient & might have been considered as the law of this country, have never been regarded in the very few actions of waste which have come before the Ct. of C.

It is but a small part of the law of waste that is at all necessary in this country, & Mr. P. suspects that such part only of the Eng law, as is applicable to the state of this country would be recognised by our Cts.

In all cases where an action at law may be had for waste committed, the Ct will grant an injunction to stay waste, & in some cases where no action can be had at law for the waste

In the following cases the Ct will grant an injunction to stay waste, tho no action of law can be had, of the waste be committed: 1st. a trustee - 2d. a tenant in tail after possibility of issue extinct, if the waste be

WASTE

2. Show. 69
Moor. 554
1 Ven. 23
1 & 2 Wm. 528
1 Ann. 56
3 Atk. 216
2 & 3 Wm. 242
1 Salk. 161.

extravagant — agst a tenant between a lifes-
tate & the inheritance a freehold intervenes —
agst a lessee without impeachment of waste, if he
commit malicious waste & such as it cannot
be supposed the lessor intended to permit the les-
see to commit — agst a mortgagee in possession
or a mortg. where the mortg. does not seek
to eject — & agst a lessee without impeach-
ment of waste who opens new mines on the
lands. In one instance of very malicious & extra-
vagant waste, an injunction was granted agst

2. Vernon. 738 — a tenant for life under a marriage settlement

Of Ejectment.

Of Actions to recover real property in Eng. which are now out of use. Vide Black. Com.

Of the Eng action of ejectment which is now the action by which the possession of lands is obtained. Vide Black. Com.

Ejectment is the only action in E for the recovery of real property. It is far from the fiction of the Eng actions of ejectment. The Ofsets pleads in his want that at a certain time (it is immaterial what time if within the period of fifteen years) he was seised & in possession of the land in question, & that at a certain time the Deft turned him out of possession. And to prove possession at the time is sufficient to shew a title.

It is in many instances doubtful whether the injury done is an action only a trespass. Mr. D thinks it now a settled rule that, if the act done be equivocal, the party may elect to consider himself out of possession or not. If the owner elect to consider himself dispossessed & brings ejectment, the Deft may disclaim the seisin or possession, which being done is entered in the records of the Ct & concludes the Deft as to any claim of title in him.

Ejectment

In Eng always, & usually in U. no more than nominal damages are recovered in an ejectment. In U. the Pltf may prove his whole damage and recover the whole in ejectment. In Eng always, & in U. when nominal damages are recovered, trespass is brot to recover the mesne profits. It has been very lately questioned whether the action for the mesne profits is maintainable. The Supr Ct decided in favour of the action.

Perhaps for the mesne profits may be in the name of the real or nominal Pltf in the ejectment.

In an action of ejectment every defence which can be made, may be made under the gen issue, except the Stat of limitations.

The Stat of limitations in Eng has been construed to take away the right of possession only, & that a remedy by a writ of right still remains, after a recovery in ejectment was bared. This construction has been contended for here; but the Cts have adjudged that the Stat takes away the title as well as the right of possession.

No title can be gained by possession in wild & unenclosed lands. Mr. Otphas, however entertained doubts whether a title may not be acquired in such lands by possession where one has constantly gone upon the lands & taken off wood for his family.

It has been adjudged that an actual possession of enclosed lands for 15 years when the fence was supposed to be in the proper place, but, in fact, was upon the lands of one, gave no title to the other.

# of forcible entry and Detainer

The remedy for forcible entry, & Detainer depends on Stat. both in Eng. & in C. The Stat of C. is in spirit, the same as the Eng. stat, but in words, a little different. The construction, therefore, given by the Eng Cts to their Stat, may be considered as the law of C.

The offence of forcible entry depends not upon the question in whom the title of the lands is; for the offence is the same, when a forcible entry be made upon one's own land as upon the land of another.

An entry, to complete the offence of forcible entry, must be with such force as might occasion terror. & herein the entry may become forcible, by the commission of any unjustifiable violence or outrage after the entry. But an entry with force, for the purpose of proving thro to make forcible entry upon another, or to do any other act of violence to another; & not to take the force possession act him, upon whom the entry is made is not the offence of a forcible entry.

~~Hawk.~~ 280
1 Hawk. 281

Ind. entry with a number of others armed with clubs, or other weapons; an entry by one alone armed in any manner, or an entry by one alone unarmed, threatening personal abuse to the possessor or his family is construed an entry with such force as constitutes forcible Entry. But threatening injury to a man's property; or, perhaps, threatening future abuse to his person is not sufficient to constitute forcible entry.

~~Hawk.~~
1. Hawk. 81

All persons aiding & assisting in a forcible entry are guilty, as principals, of the offence.

1. Hawk. 279

If one attempt to make forcible entry, & fail in the attempt he is guilty of the offence.

Possession obtained by forcible entry cannot be holden; but the freeholders Ct will give Judgment to repossess the man who has been turned out, without regard to whom the estate, in fact belongs.

The Stat. gives treble damages for a forcible entry. It is questioned, whether an action for damages can be maintained agst the wrongdoer for forcible entry.

Forcible entry & Detainer

The same force is necessary to constitute the offence of a forcible detainer, as a forcible entry; & the same force in one case as in the other.

1 Hawk. 281

If one claim possession, by force, of his estate has detained he is guilty of a forcible detainer. The same is the case of one, having obtained peaceable possession of that which is not his own, defends that possession with force.

If one find the owner & all the rest of the family absent from his house and enter it, the owner, on his return may endeavor him with force & shew no offence. This is reasonable on the ground that the owner is not considered as having lost his possession by the entry of the other person.

A forcible ~~entry~~ detainer cannot be by the owner; & in case of a forcible detainer, the freeholders at most determine whether the title be in the Deft or not. But conviction of a forcible detainer does not conclude the party as to his title.

If the owner attempts to make entry by force, & the possessor defends against him with force; the former is guilty of a forcible entry, & the latter of a forcible detainer.

If error is taken from a judgmt in a freeholders Ct in case of forcible ~~entry~~ detainer, & the judgmt be reversed, the reversing Ct gives ex^n of restitution.

The proviso in the last section of the Stat of C. seems to be inexplicable.

Stat. 8 Geo. 209

1 Mass. R.C. 279 &c

For laws on this subject we refer in margin

None of the Stats of mortmain the ancient, have been considered of any law in this country. In C. there is no Stat authorising grants of lands to charitable uses; but there is a stat, countenancing the practice of making such grants, & providing that estates so granted shall remain & continue to such uses or uses as they are granted to according to the true intent & meaning of the grantors. This Stat. is acknowledged, takes away the power of alienating the fee of such lands; but a practice has obtained of leasing it for nine hundred & ninety nine years, for a sum nominal, which is, in effect, a disposition of the fee. Mr C. thinks that such leases do not the intent of the Stat, & are not to be defended under the Stat.

Stat. 63. 252.

Possession & Title

It has been the construction of the Act of limitations, that it bars the possession only leaving the title in the owner. The construction given to the Act of this State is that it bars both the possession & title. The reason of the different constructions of the two Acts which are both in the same words, it is supposed to be, that the law of one country confounds the right of possession & the title, as being of indistinctly, & the law of the other knows of no such distinction.

If the man in possession & he & they under whom he holds, have, all taken together, had a possession of fifteen years, it is sufficient to secure the title, tho' the possession of no one of them taken separately has been for that term of time. And the case is the same if one have possession under a lease of ten or more years, or if he holds by grant.

When the Act of limitations has once begun to run, notwithstanding the estate falls into the hands of an infant, feme covert &c it continues to run.

If several hold lands in partnership or are tenants in common, or joint tenancy, and one dies, leaving his share to the heir, who is a minor, the Guardian of the minor is authorized to make partition between the surviving partner or partners.

Stat. B. 2. 58

If lands are devised to be sold by exors. to pay debts, and if a person refuse to take upon them the execution of the will, such as do undertake the execution of the will are enabled by Stat to sell the lands devised for that purpose. This Stat, however, does no more than empower the exors to sell, who undertake the execution of the will, & if he neglect or refuse to make sale, there is no law compelling him to do it. In this case, & in the case that all the exors refuse, the Chr. Courts in Chy may be bro't to compel a sale.

Stat. B. 2. 64.

If a husband sell the lands of his wife, without her joining in the sale in the manner provided, the Stat declares such sales void. But it has been adjudged that the sale is good to passe the husband's interest.

Possible Entry & Difficulties

In Eng. the soil of the highway belongs to the Lord of the manor. To whom belong trees growing in a highway is a question. Generally they are said to belong to him who owns the land on both sides. Mr. Ch. is of opinion that they belong to him who owns the land on both sides so that no one may cut them except the Lord of the manor; but that gift unto them he is not liable. In other respects soil of highways belongs to the inhabitants of the town, when the lands were given by them in other respects it is in the town.

In Eng. the reason that the trees growing on the highway belong to the owners of the lands on both sides, Mr. R. supposes to be that he has a greater advantage from them than any other person; & having been in the enjoyment of that advantage, no one may take it from him. Of this the reason it may refer to sires to whom trees belong growing the highway in this country.

Mr. Ch. doubts whether any title can be acquired under the act of limitations, to a part of a highway by including it in a form & holding for fifteen years the right from it.

It is by statute made the duty of towns, and in some cases, of the County Courts to make all necessary roads. It is also made the duty of towns to keep in repair such roads as are made & to make & keep in repair all necessary bridges, & make them. Either a town may not erect a bridge across a navigable river or an arm of the sea. This power is in the Legislature.

I am, therefore, of the opinion that for any neglect of my duty in a road or bridge, the town in which such defective road or bridge is, notice of the defect has been previously given to the town in such manner as the statutes prescribe to the selectmen, husband, surveyor, or other officer of the district one hundred pounds; & for want of the selectmen, husband, &c. to the mortality. From the manner in which the statutes relate to the selectmen, husband, & a question has arisen to whom the legislature must be given.

It is questioned whether the double damages given for the last for a broken tow, for injury to a horse, carriage, & occasioned by a defect in the road or bridge can be recovered if no notice has been given of the defect. The Court have in a single instance decided that double damages may be given tho no notice was given. Mr. D. opinion is opposed to this decision.

Of the Law of Evidence

It is a fundamental rule in the law of evidence, that the best evidence must be produced that the nature of the case will admit. It is not to be understood by this rule that the best evidence which might be had in a case of the same nature is alone admissible. It must be the best evidence in the power of the party to produce in that particular case.

Hearsay testimony may not be admitted to contradict or enlarge any written contract or writing. Hearsay testimony is admissible in lieu of best evidence, when it was intended by the parties to have been in writing & left out by mistake, or to show fraud in the contract.

Evidence of what another has said is not admissible. What a party has been heard to say against himself may be proved. It has been contended that evidence in the parties favor may be admitted of what he said when no dispute existed, no suit was pending. This is not admitted.

It is permitted to impeach the testimony of a witness, by shewing that the witness has, at other times told a story different from the testimony given before the Ct. But a party may not in this way impeach the testimony of his own witness.

It is a question in the Eng. Ct. whether witnesses may be produced to shew, in corroboration of the testimony of a witness, that he has at other times told the same story which he tells the Ct. Int. witnesses are admitted for this purpose, when an attempt is made to impeach the testimony of witnesses by shewing that he had told another story out of Ct. to too when the witnesses are children.

The testimony of a witness may be impeached by shewing his general character for truth & veracity. No other part of his character may be touched upon, & no particular instances of falsehood within may be proved.

Law of Evidence

Evidence of a report, that a person abroad is dead is admissible.

Evidence may always be admitted of what strangers have been heard to say relative to the bounds of lands.

Evidence of what a person dead said when living may not be introduced unless it was testimony under oath; what a man testified under oath may always be proved. So what a man has said in contemplation of death

36 Ben. 12-14

Persons interested cannot either at law or in equity, testify in their own favor. There are, however, cases, where from necessity persons are admitted to testify in their own behalf. Cases in which interested persons are admitted as witnesses are — of one employed to do business for another — of a debtor who has escaped in an action against the Sheriff for a voluntary escape — & of a prisoner offered to testify for the Sheriff in an action against the keeper.

If a public law cannot otherwise state that such an interested person is to be admitted, the statute which allows the party to testify in his own favour, in such a court & battery, is upon this principle —

A person cannot be subpoenaed in a court of law to testify against himself, in order to convict, & the party may be prosecuted for, if he refuses to testify. All this is alleged on the other point is admitted for truth. The case of subscribing witnesses, who are bail for the obligor in a note on the instrument he & they have subscribed as a witness, is an exception to the rule just laid down; & the bail will be compelled to testify. So if a subscribing witness do in any case become interested by his own act, the party is notwithstanding entitled to his testimony —

1. Strang. 1200

The Eng. Cts have made other rules to admit all persons to testify who are not interested in the event of the suit, & to exclude in no case a witness, except interested in the question. This rule the Sta in C. have not adopted, neither was it formerly a rule in the Eng. Cts —

2. Dunn.

Laws of Evidence

All persons are said to be interested in the event of the suit, so as to be inadmissible in the cause, against whom an action may be given on the judgment which may be rendered — against whom the judgment may be made the ground of an action — against whom the judgment may be given in evidence in any other action or against whom the judgment may be in any way used.

It was formerly the law of England still is the law of C. that a person barely interested in the question is in some cases excluded from testifying.

In cases of private prosecution for an Assault & Battery the person assaulted is admissible. But in a public prosecution for forgery, perjury, or usury the person injured may not be admitted as a witness. Mr. R. cannot see the distinction, in principle between the case of Assault & Battery & the case of forgery. In neither case the verdict can be used in evidence in favor of the party injured. Mr. R. is rather of opinion as he can reconcile the cases in no other way, & as he thinks he has somewhere seen it said, that if there be a conviction of the crime, it is conclusive against the instrument forged, & the obligation for the money borrowed.

1 Vent. 49
contra Hard. 351
Co. Litt. 6
2 Roll. 685
Strang 1229

There are several descriptions of persons who cannot be witness before a Court in any cause; & some who cannot be witnesses in the particular cause or trial, & yet may in others.

1. In conformity to the general rule first laid down, a person cannot be a witness in his own cause, nor in any cause in which he is interested.

2. Persons infamous

3. Persons destitute of discernment

4. Persons intrusted with the secrets of one of the parties, as Lawyers.

1st The interest must be a pecuniary interest & not that of relationship or friendship. The quantum of interest is not material. The smallest excludes the witness. It is immaterial whether the interest is direct or consequential. As before mentioned, a Bail is excluded for the judgment against the principal may affect him consequentially. Yet the bail is admitted in a question which concerns the title, & it is evident that he may be interested consequentially. We leave a practice in this State of changing the Bail when he is wanted as a witness.

Law of Evidence

To the rule excluding persons interested from being witnesses, there are many exceptions, arising from the necessity of the case

1. The act of an agent is proved by the agent, tho by his own oath he swears himself clear of all liability to his principal. As when A. sends money by B. to C. B. is admitted to swear that he delivered the money over to C.

2. In a case before mentioned where a Slave will wholly fail of effect. Upon this principle it is that in Eng. the person robbed is admitted a witness upon the Indictment in C. where a person has had property stolen he is admitted to testify to the fact of his having lost property; but not to swear to the person who stole it, tho he caught the thief in the act & see him run off with the property.

3. In case of a voluntary escape as before mentioned

4. In case of a rescue as before mentioned

5. In an action of account the interested person is permitted to swear to his account.

6. By certain Eng. Stats interested persons are admitted as witnesses. So in this State in a book debt action the Plff is admitted to swear. So in an action of trespass, the Plff is admitted to swear to the trespass & that he suspects the Deft. This throws the burden of proof on the Deft to shew his innocence. This is the case with our Weight Law. But we have given these two last Stats such a construction, that the Deft is not found guilty unless the Plff adduces sufficient proof.

Obs of the Plff allow the Deft to swear but this is not to help himself, but the Plff. This an appeal of the Plff to the Defts conscience. The Plff is not to be bound unless the Deft on the same way appeals to his conscience. But the Deft cannot be compelled as other witnesses yet his silence is deemed a confession of what the Plff has alleged.

7. The master when sued for his servants negligence may introduce the servant to prove that the accident did not happen by negligence so that he is interested; for if the master fails in the action he has his remedy agst his servant.

Strang. 1083 Every servant is supposed to have engaged to conduct his masters business with fidelity.

Law of Evidence

8. Altho a man is interested, yet if he has an equal interest on each side he is admitted to testify —

9. At com law all the members of a corporation are excluded from testifying in a cause in which the corporation is a party, let their interests be ever so small. But by a variety of Eng. Acts members of corporations are now admitted to testify in their own causes. What has been effected in Eng. by Statutes has been effected by their adjudications. They have ever admitted members of corporations to testify in their own causes, not regarding their individual interests. This is undoubtedly from the necessity of the case. The rule is thus, they are always admitted to shew the fulfilment of any duty incumbent on them, or any obligation &c — the inhabitants of a town are admitted to shew that their bridges are in repair. But they shall not be admitted to shew a contract or agreement, as that the minister of the Parish agreed to accept of a smaller salary than was agreed upon at first; for the necessity does not here exist. The contract may be reduced to writing. The agent of the town in the suit is entirely excluded, tho with little reason.

Strang. 1 L. 595 — Interestedness in the question sometimes excludes
9 G. 1 - 1055 — & sometimes not

If a man procures them to be witnesses with a design to exclude himself, or if one of the parties does it, it shall not exclude him. A man is not thus to be deprived of testimony

If a man supposes himself bound in honor to pay a debt, & the suit goes agst
Strang 125 — one of the parties, he is excluded

The Bail is sometimes adjudged to be a witness not for his principal, but for the other party: as if the Bail is one of the subscribing witnesses to the instrument on
Strang. 106. — which the action is brought.

The interestedness of the witness may be shewn either by calling his other witnesses to prove it or putting him under the voir dire. Under this oath he must answer to his interest in the event of the suit, & not to the merits of the cause. If some of the parties attempt to shew the interest of the witness from other evidence he shall not challenge him under his voir dire, & voir ensue, — being debarred in one attempt he shall not resort to another.

Law of Evidence

The husband or wife are not admitted to testify for or against each other, even if the husband consents that the wife shall testify against him. She shall not be inquired of. The reason of this to preserve the peace of families. She may be a witness against the husband for his abuse to her. The same law down by L. Mansfield to be good law — In case of treason the wife may testify against her husband, probably that would not be admitted in this country.

Harris 264

Stary. 333
L. Coddlers Cop
Plat. 115

When a number of persons have been guilty of an offence, as if B. & C. had been guilty of an assault & battery one of them may be sued & the other taken as a witness; yet the other is evidently interested, for if he can so swear as to throw it upon one the other is quite clear.

2dly In, infamous persons are excluded from testifying. No person is legally infamous so as to exclude him from testifying until he has been convicted of a crimen falsi, a crime of such a nature as clearly shews the person destitute of integrity: such as perjury, theft, forgery &c. Such dishonesty, treason,

be are not of the crimen falsi & of course do not exclude those guilty of them —

Barratry in Eng., is considered as a crimen falsi; & perhaps would be so considered in this country. There must have been a conviction & a man's infamy must always be known from record; & no parol testimony is admissible to prove either the crime or the conviction

In E. if a man after a conviction of a crime, which excludes him from being a witness, obtains from a long course of years a good reputation he is admitted to be a witness. In Eng. a pardon restores the criminal to his competency as a witness; unless the Statute on which he is convicted expressly disables him from testifying forever afterwards, in which case the exclusion makes a part of the punishment, & a pardon will not restore the criminal to his competency. A scandalous punishment for a very scandalous offence, altho not of the crimen falsi does not destroy a man's competency but goes to his credibility.

Vent. 349
2 Rod. 74
Salk. 689

Co. Lit. 3.

Formerly Infidels in Eng were excluded from testifying. But by decisions of the Ct they are now admitted; Shackel. an instance of this making law. This principle was not recognised in Scotland. Hey & Ro. ~~Hey~~ ~~Ro~~ ~~Hey~~ ~~Ro~~ can swear by the ever living God is admitted. This gave rise to the form of our oath. A professed atheist is not excluded, both in this country & in Eng. Infidels, apostates & excommunicated persons are admitted in Eng. Not in this country. Quakers are in Eng excluded from testifying in criminal cases, yet admitted to affirm in civil. In C. they are admitted in all cases.

Shang. 1 Ld. Ray. 1.

2 Hawk. S.C. 612.

Stat. 1 Ed. 6.

6 Geo. 1 c. 7

In case the Ct. refuses in Eng to the Defdt confession he is not obliged to testify if he will thereby criminate himself rather is any inference to be drawn to his disadvantage from his silence. But if the penalty is going to the Pltf & he releases the Defdt from the penalty he must testify or silence will operate against him.

The party who calls in a witness can never impeach him, for if this was a fraud it would be done wantonly.

No man shall be called upon as a witness to invalidate an instrument which, by his signature has been made current

1. Dunn 296

2dly Idiots & persons of defunctment are not admitted as witnesses, as idiots or lunatics. Children are admitted as witnesses but there is no settled rule as to the time at which they shall be sworn. If they understand the nature of an oath they may be sworn; whenever they have discretion they are admitted to tell their story without being sworn.

2 Hawk. P.C. c. 12.

Strang. 700.

3dly Attorney's agents entrusted with the secrets of one of the parties are excluded from testifying in the cause. But what knowledge the Lawyer has independent of the information of his Client he is bound to disclose if called upon. The form of the oath "to tell the whole truth & nothing but the truth" is left out, for he may not disclose secrets. If a man who is not an agent & is intrusted with a secret by a confidential friend he must disclose it if called upon. This has been so determined by an Supr. Ct.

Strang. 40

Dunn.

Laws of Evidence

The mode of getting a witness into Court is by Subpoena or Sufferance, which must be signed by some authority as a Justice of the Peace. If expenses have been tendered the witness he is obliged to attend at the Court. If he neglects to attend he is liable to be punished for a contempt of Ct. & is also liable for all damages the party sustained for want of his testimony. But it is generally very difficult to determine what that damages are. In Eng a witness thus in default is fined £10. & liable for all the damages the party sustains. When a witness is summoned in, all the evidence about him may be called for, as his papers &c. This is called Duces tecum. But when a witness has them book in his papers he is not obliged to exhibit them, if there is any reasonable ground for keeping them back, as if they are his private papers.

In Eng the testimony must all be given viva voce unless he is sick &c, which is a very good regulation. In Ch. the testimony is all by depositions taken by the master of the Roll. In this State no depositions can be taken within 20 Miles of the Ct. unless in case of witnesses &c. Stat.

When Depositions are taken out of the State the adverse party must be notified or his known attorney if within 20 miles of the caption. If the party taking the Deposition lives out of the State he shall give notice to the known Att. ney or the adverse party himself if within 20 miles of the caption. When a Deposition is taken all the parties agt whom it is to be improved & who are within 20 miles must be notified. If the witness lives within 20 miles of the party but should be found more than 20 miles from him & his Deposition then taken, notice need not be given & the Deposition is good.

Hardy. 1.
Stat. 1.65. & 35
Root. 307.
Root. 316. & 80. & 93
Kirby. 190
Kirby. 219. 283

But if the party summoning elects to have the witness present, & tenders the money for his expenses he must come altho he lives at the extreme part of the State; & sending his deposition will not excuse him. Depositions may be taken within 20 miles of the witness is sick or going out of the country, or is afflicted with some sickness that he will not probably survive. In these cases the deposition may be taken & read when occasion calls, tho it be the Deponents death

Rule – The best evidence the nature of the case will admit is required. But a parol contract may be proved by a parol contract; tho it might have been reduced to writing & higher evidence thus create. The rule means barely this that the best evidence shall be produced that the nature of the case, under existing circumstances, will admit. If a contract has been reduced to writing it can not be proved by parol, unless the writing has been lost by inevitable accident. In this case parol evidence may be admitted, but it is incumbent on the Plff to shew that a writing was lost. For there may have been part payments indorsements &c. If the Plff is allowed

to prove the note by parol, without proving the loss, he may, at any time, when a note is half paid, say that he has lost it & recover the whole. But proving the loss does not entirely remove the objection.

Parol proof is never admitted to shew a record. The record itself, or a copy of it duly attested must be produced.

When it is a thing recorded or a deed, then the party availing himself of his own deed must shew the record. But if the title in the grantee could be effected without recording, third persons may shew it by parol. As shew A. conveys lands to B. who neglects to get the deed recorded. D. a creditor of B. hears of the intended conveyance & attaches the lands. Now the power of conveyance still remains in A & his conveyance to a subsequent bona fide purchaser will defeat B's deed if it is not on record. But A does not convey to a subsequent purchaser, but brings a writ of ejectment agst D. D may shew by parol that the deed was executed from A. to B. which is a good plea agst the writ of ejectment. D in this may compel B to prove his deed recorded.

When a party declares upon an instrument lost the technical mode of declaring is that it was lost by time & accident No parol testimony can be introduced to shew or vary the operation of a writing; & no subsequent parol condition will effect a writing

Tram. Rep.

Altho the instrument says signed sealed & delivered, yet what ever relates to the delivery may be proved by parol.

If, thro mistake, the writing bears a date contrary to the true date. the true & real time may be shewn by parol. The date of the writing is prima facie evidence of the date; but this presumption may be rebutted by parol.

The natural import of the words, as they stand in writing, is taken as their true import; & yet a set of cases is opposed to this rule, as when parol proof is admitted to rebut an equity. The legal & equitable import of words in a writing are different sometimes. As in case of a Mortgage, or bond with penalties; but in the last cases, Cts of Law as well as Chy will now chancery down the penalties —

On a gen. plea of bankruptcy the D. may give the condition of the bond on which the action is brought in evidence to show that he is not barred by the certificate

Mosf & Prin Doug. 155.

If any ambiguity arises out of the writing itself parol evidence shall not be admitted to prove or elucidate it, but if some ambiguous matter arises dehors the record or writing parol evidence is admitted to explain it. As a man giving an estate to his son John, having two sons of the same name. So also another distinction in the case of Generos & Paints & Brown Ch J facts relevant cannot be proved. Of these the Ct are judges. When the question is whether the evidence proves a particular fact, the Ct will allow it to go to the jury altho they judge it insufficient. This is in use when there is some inference to be drawn from the fact in favour of the point before the Ct. But when the inference to be made is relative to some other point the Ct rejects it.

Brown Ch J

As to the number of witnesses in ordinary cases, the civil law requires two, but the common law only one. Our Acts require but one. For treason & perjury only two witnesses are required.

But one that two witnesses, or what is tantamount to two are necessary to convict a man in all capital cases. By tantamount is meant circumstantial evidence.

It may be a question whether one deposition is sufficient, as we adopt the big com law with regard to the sufficiency of one witness, & as that law always requires viva voce testimony. Perhaps one deposition should be deemed insufficient. Viva voce testimony is far preferable to that by deposition. There there is an opportunity to cross examine, and a villain may frequently be detected in falsehood. In deposition there is not this advantage. A man in this country made it a common practice for several years to procure depositions of worthless fellows who would for a glass of rum swear to any thing

Laws of Evidence

It is common for the Pltf to attempt to cut off the Deffs testimony as in case of an Assault & Battery. As for instance A in the presence of B. & C. strikes D. but D strikes first & B & C can testify to it. To cut off B. & C from testifying they are sent into the writ. If no evidence appears agst B. & C the Ct will order them to be struck out of the writ, or A may claim to have either of them tried first, & upon them being found not guilty they will be admitted to testify

In some cases a man is not admitted to testify agst himself, as in case of a fraudulent conveyance from A. to B. C. the creditor of A attaches the property so conveyed. A shall not testify that it was or was not fraudulently conveyed.

A witness may make use of his minutes for no other purpose than to refresh his memory, & not to read off his testimony except to read off the words of one of the parties which he heard. A witness cannot be compelled to criminate himself, but he may do it if he pleases. A juryman may be a witness notwithstanding his being on the jury. The declarations of a dying man in contemplation of death is good testimony.

Dum.

By the Eng law any person summoned as a witness is not liable to an arrest, while in Ct, going to or coming from Ct. The practice in this State is a little different. The witness has a writ of protection or privilege which the witness carries with him & shews the officer. If he then proceeds to arrest him he is liable for false imprisonment. The Eng authorities do not support this idea, tho apparently they do. Their practice is entirely different. But whether the levy is void is a question not yet determined. Perhaps no man ought to reap advantage from such illegal act.

1 P. Wm. 568.
Genl. Counsel Dorp. 1.
5 C. Wm. 177.

Perpetuating the testimony of witnesses old or infirm may always be accomplished by taking their depositions. This may be done before any suit is actually commenced. What a witness has said before a other swearing may be proved to corroborate or invalidate his testimony. What the party has said yet himself may be proved. What the parties say talking together either for or against either may be proved.

Hearsay testimony is always rejected.

To this rule there are exceptions, as when the enquiry relates to reputation of a Witness. & particular facts are to be assimilated to that general reputation. & upon that a man, who has been supposed to be dead, is alive may be proved. That a man said under oath may be proved after his death. When the boundary of lands is in dispute hearsay evidence may be admitted, as what admin have been heard to say.

Of Written Testimony. The first to be taken notice of are the acts of the Legislature. In Eng. gen acts need not be pleaded specially but private acts must be pleaded specially. But in Canada. Not may be given in evidence under the gen issue, but we cannot avail ourselves of a private act that we have either pleading it specially or giving it in evidence under the gen issue. In this Eng. practice see cases in the margin

Hob. 227
Co. Lit. 282 b
6 Rep. 29

When there are two Acts, one giving an action, the other affording a defence, the latter must be pleaded specially, or else be given in evidence under the gen issue. A proviso, must in some cases tho not in all, be pleaded specially. If a nullity is to be avoided by some act that it must be pleaded specially or given in evidence. As in cases of usury.

Croke 288, b

State of other States printed in their com. Stat Book by authority of the State are admitted. Private acts that are not in their Stat Book are proved by a copy certified by the Secretary of the State.

Records of Courts are usually being copied & certified by the Clerk. If the records require that they be sealed, they are of no validity without being sealed. Private rules must be proved by witnesses subscribing, so must the instrument, if the witnesses are to be had, but if they are dead or out of the country their hand writing may be proved. Records of an office, not judgment records are warranted, they may be evidenced by a clerk of the office or by some private person taking a copy & swearing to it in Court. It is a contingent case whether the copy of a recorded deed is good evidence & admissible when the original is challenged. If the original has not been destroyed by some inevitable accident there is no good reason why it should not be produced. Keeping it back might open a door to fraud.

Law of Evidence

The delivery of a deed may be proved by a subscribing witness. If the deed is found in the hands of the grantee it is presumptive evidence of a delivery, & throws the burden of proof upon the grantor, to shew that he never delivered it.

A deed cannot be delivered to the grantee as an escrow; but such delivery with a condition attached to it is an absolute delivery. A question which has once come before our S.C. & occasioned a division of opinion in the Ct & the Lawyers, is this, can a grantor deliver a deed into the hands of the grantee upon his doing something presently? As if A delivers a deed to B. upon B's paying him down. B takes the deed & then refuses to pay him the money. Is this any delivery at all? The current of authorities is that it is an absolute delivery. So was the opinion of three of our Judges

Cro. Eliz. 835 approved

Any act of a deed or interlineation by the grantee, after execution of the deed renders it void; & the grantor may plead non est factum. But an interlineation in an immaterial part by a stranger vitiates it. The same is the case in filling blanks

11 Rep. 27 Henry v. Coke.

When a verdict has been obtained against a man on a public prosecution, it shall never be given in evidence against him on a private suit.

What a man has stated in a bill in Chy may be made use of as his confession in a subsequent trial. But what a man states in his declaration in an action at Law can never be thrown against him. Ld Mansfield questioned the propriety of admitting as a confession what was stated in a bill in Chy. The answer in Chy is always good evidence; for it is given on oath of the party.

Ibid. 221

We have a law relative to the recording of births. When the age of a person is in question an appeal is made to a record. If the birth has not been recorded other evidence is admissible, but it is incumbent on him who to require it to shew that there is no record.

By the Eng law a prosecution of any kind on which the action is brought is indefeasible. But in C a prosecution is commenced by

Law of Evidence

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11 Rep. 27 Henry v. Coke.

Presumptive evidence is admitted, & when the presumption is violent it is conclusive. But great caution, particularly in capital cases, should be taken, for the presumption, tho violent is not ~~infallible~~ infallible. As in the case of the murder of Buchan. A stabbed B. & left the room at a back door. C enter the room at the same time draws the sword from the body of B. & then persons enter the room while C is holding the sword. Upon the strength of this evidence C is tried, convicted, & executed. Twenty five years after A confesses the whole fact.

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Pleas & Pleadings.

See Ante, page 135

This subject comprehends the various Rights & Defences that a Deft can make in a cause; & also the Rules for Declarations & pleadings.

1. The first business of a Deft is to look to the Jurisdiction of the Ct & see if they have cognizance of the cause. If he finds that they have no jurisdiction of the cause he puts in a plea to the jurisdiction praying the Ct to dismiss the action, & dismiss the Deft. This plea he must always sign in propria persona. It cannot be done by his attorney.

2. See if there is not some defect in the writ — if there is not a misnomer — if duly is paid — if served in due season & in a proper manner &c. If any defect appears plead an abatement. The writ & declaration are joined together on the same piece of paper. The writ is the first part. An abatement affects only the writ. It affects neither the action, which may be the subject of an abatement.

such as the service leaving a copy &c. If he will abate the Deft recovers his costs; if it does not the judgment of the Ct is that the Deft answer.

If the abatement respects a matter of law, the Ct will determine it on a demurrer. If it is a fact & traversable it may go to the Jury.

3. If the Deft finds that the Ct has jurisdiction & that the writ is good, he then looks to the declaration, & examines if all the allegations the Pltf has made contain matter enough to subject him of true. If the Deft is convinced that the allegations will not subject him, he demurs to the declaration. As to charge a man with being a liar. This is not a crime fitted of such a nature as will subject him. If on this ex. he demurs to the Declaration he is safe.

If the principal fact in the declaration is demurred to, as being insufficient to support an action, & the demurrer prevails, it is a bar to any further action on that charge.

But when the declaration goes out for want of some essential allegation, there is no bar to a new action on the same charge.

In such of these cases above mentioned a general demurrer is proper.

A special demurrer is when the allegations are all made & facts stated sufficient to convict the Deft; but there is some informality in stating the facts & making the allegations. This is a case of a special demurrer. The difference between a general & special demurrer is this. In a special demurrer the verdict of a jury cures the defect, but in a gen demurrer no verdict can cure the defect; but the Deft may move in arrest of judgment. Special demurrers are most frequently put in on account of some informality. —

When the Deft cannot object to the jurisdiction of the Ct nor abate the writ, nor demur with safety to the declaration he pleads the gen issue not guilty of the charge made against him. If found

guilty on the gen. issue he may move an arrest of Judgment, if there is any essential defect in the declaration.

If the Deft is sensible that the charge alledged in the declaration are true & can be proved agst him, & he is also sensible that he has matter that will excuse him, he may plead it in bar. This will be called a special plea in bar. The Pltff may demur to the Defts plea in bar, that the matters therein contained are insufficient in the law to bar his action. These are the methods on which must always be pursued by the Deft in his defence
1 Demurrer — 2 Gen. Issue. — 3. Special plea in bar.

The Pltff may move an arrest of judgment in consequence of any material defect in the Defts plea; as well as the Deft in consequence of any defect in the Pltffs declaration. In these cases a repleader will be granted which will begin with the last defect in pleading. But with us the usual practice is to begin de novo. In this state there may be an arrest of judgment for other causes than those in Eng.; as for a flaw of the Party or Jury &c.

A Writ of Error, is the next step, but this can be taken only upon matters appearing upon the record. But for any matter of fact, or error of judgment, not appearing upon record no writ of error can be taken. When a witness has been admitted or any testimony admitted which either of the parties thinks inadmissible, a bill of exceptions may be filed & the presiding judge must sign it. This will appear upon record, & then a writ of error may be taken. So when a Jury have delivered in a verdict & the Court refuse it & give reasons to the Jury why they should bring in a different verdict which either of the parties thinks insufficient or erroneous, a bill of exceptions may be filed, & then a writ for a writ of error be taken.

When the judgment in a writ of error, is reversed on the ground that the declaration is insufficient, then is an end of the business. When it is reversed on account of the insufficiency of the Defts plea or for any reason that does not affect the merits of the case the Deft may enter his action anew.

In case there has been no legal bar to the Deft or Pl, may, then though only he should have a new trial granted him. If a new trial is granted it vacates the old judgmt. But the judgmt is operative so far as to protect the Sheriff, & the party for any steps taken under the judgmt. A new trial granted in case tortious property has been levied upon. But our Cts will not grant a new trial without some condition attached to it, as that he shall secure the Pl in case he obtains a second judgmt.

The Audita Querela is the last step which can be taken, which is to stop execution. It is indeed a complete discharge of the execution. But the Deft must give a bond to the Pl for his security in case he does not prevail.

There is such a thing as an error in fact: as when a Ct has given judgmt on the truth of some fact. As when a judgmt is given against a minor supposing him to be an adult.

1. Pleading to the Jurisdiction.

The Deft must move the Ct to dismiss the action; & this motion must be signed in the
Gilb. H. C. L. 187 Deft's own name or in propria persona.
If the Deft prevails in his plea to the Jurisdiction our Cts will lay costs for him. This practice is hardly maintainable.

The Pltff for bringing his action before a Ct which he knows has no Jurisdiction of the cause is liable for a vexatious suit. But if he is ignorant of the want of Jurisdiction in the Ct he is liable only for single damage - in the other of double

2. Abatement. Outlawry is a good ground of abatement Eng; but not in C. It is not know to our law

× Excommunication in Eng is a ground of abatement. but not in this country

Alienage of a subject of a country at war is
Co. Lit. a ground of abatement. But an action for personal estate may be brot by a subject of
D. & Roy. 222. a country at peace of war in open war. But at no time for real property. If the Deft is a privileged person it is a good cause of abatement. Every person is privileged on

sunday from arrests in a civil action. Members of the gen Assembly are privileged from arrest during the session & going to & coming from the session. Misnomer is a good ground of abatement. But in this case the Deft must state what his name is, so that

Chaney 816 — Pff may bring his next action right.

In case of a misnomer the Deft may let judgment go on & get him. If judgment is recovered & execution taken out he may pay it & this will be a bar to the Pffs bringing another action for the same cause in the Defts right name. Or the Deft may take no notice of the action, let judgment go against him, execution be taken out, & when the Pff comes he will find it not against the right person & cannot proceed; or if he does he is a trespasser.

When there are more Pffs or Defts than one to a suit, the death of one is not an abatement of the suit; unless it is an action for the recovery of

Gilb. H.C.L. 243 real property. When the suit is abated. If the right of the Pff is altered by the death of one of the parties the suit abates.

When there is one Pltf & one Deft & either of them dies the suit does not necessarily abate. In some cases it does & in some it does not. When it does not abate it is carried on by exrs. When the Pltf dies the right of action descends to exrs in all cases where he or they would have a right to maintain an action. When the Deft dies the action shall not abate where the exr would have been liable. Let us examine those cases.

It is said that torts die with the party but this must be understood with some limitation. For in some cases the exr has a right of action for torts as well as on written contracts.

When the injury was done to the person or character of the Pltf deceased, on his death the action abates, & the exr cannot carry it on. For the exr could not have brought forward the suit. When the tort affected the property of the Pltf deceased the action shall not abate on his death

; for the exr would have a right to institute a suit for such a tort. & if it has been instituted by the testator, the exr may come into Court & pray that he may be entered as Pl. in the suit in stead, he proving that he is exr, & the suit shall go on.

Suppose the Deft dies. As a gen. rule the action shall not abate if founded on a written contract for the exr is originally liable. In an action for a tort wherein the effects of the testator have been benefitted, the action does not abate on the death of the Deft but survives agst his exrs. +

+ But where there has been a tort to the injury of the Pl.'s estate, & the Deft's estate has not been benefitted thereby, if the Deft dies, the action abates and cannot be carried on agst the exr. As where one shoots the horse of another the exr is not liable. See case of Hambly & Trott. The right of action survives agst the exr; but in trover and other torts the form of action is changed; for the tort is wiped away by the death of the Deft.

It is not true that the ex^r is in all cases liable for the contracts of the testator. In all cases where the Pl^f by the contract was entitled to any thing or had a claim or right of action, the liability survives to the ex^r. But where the liability is occasioned by the negligence of the Deft, as in Sheriff for an escape, & there is no probability that his estate should been benefitted. the ex^r is not liable.

When the Deft dies the Pl^f may pray not a scire facias to call in the Deft's ex^r. But it is not provided by any Stat, that the Deft may pray such a scire facias to call in the Pl^f's ex^r; but the Revisors suppose that a Ct would permit it.

Ndy. 140
Hung. 811.
D. May. 1525

In case a feme sole brings an action & marries it abates the process. If an action is brot^t agst a feme sole and she marries it does not abate the process. When two suits are pending for the same thing it abates the last.

When the Defendant becomes insolvent that he has sued a bad writ, which has not been returned by the officer; if the officer will give it up to the Defd, he may get out a new writ. But writs on Ds will not abate tho' one writ has been sued before for the same cause. One only having been returned

5. Co. 61. When two writs are issued on the same day both abate.

If the writ is not signed by proper authority it will abate.

Debts not paid will abate the writ.

When an inhabitant of another state being forward an action, without entering bond by a citizen of this state, the writ will abate.

One rule in pleading abatements is that it must be pleaded before imparlance, or adjournment of the action. To this rule there are some exceptions. If on the judgment rendered there is an error in fact, the writ, at any time, may be abated. As where an action has been brought upon a feme covert it would be error in fact to render judgment against her.

Where the cause of abatement arises after impleaning, as an action brought by a feme sole who during the impleaning marries, this is a good ground of abatement.

Obs. 2. that all pleas in abatement are to be settled before calling of a jury together; but the practice is universally to settle these pleas at any time before the jury are dismissed.

After a writ has been abated it may be amended by having costs, if the amendment corresponds with the truth of facts, & not otherwise: As when a writ states that the Deft belongs to one town when he is such belongs to another, this writ may be amended by inserting the true place of his abode.

Obs. 3. that, when there is a joint obligation & one of the obligors out of the state, if the obligation is sued & writ served upon the obligor within the state living it is a good service upon both; for the law does not require service upon both.

When the writ is over abated, & an amendment is permitted, the defect on which it is abated may be amended, & the writ also amended throughout.

In case of an abatement the Pltff is compelled notwithstanding to pay the costs of the Deft; but if he prosecute his case he loses the costs only till the time of the abatement; & can recover only that cost which has accrued since the amendment of the writ.

If the Deft traverse any fact in abatement, which goes to the Jury & they find it in the Pltffs favour, judgment shall be rendered for him; & the Deft shall have opportunity to make no further defence.

When an action is brought upon some instrument which is described & declared upon in the declaration, & upon oyer of the instrument it does not appear to be the same described in the declaration the action shall abate.

A note given dated the 1st of May to be paid the 17th of May next has been adjudged to be payable the 17th of the same month

thang

Demurrer is an admission of the facts, but a denial of the consequence. The Deft in his plea after admitting the facts, says that they are insufficient in the law to subject him. Gen demurrer applies only to the subsistance & says that the matter is insufficient. Under a gen demurrer advantage cannot be taken of the form or manner. Under a special demurrer you can take advantage of both form & substance; so that it is more safe to plead a special than a gen demurrer.

Neither the gen nor special demurrer admits any fact to be true which cannot be proved: to when an action is brot on a note of hand, the Deft plead specially that there was a parol agreement between him & the Pltf, that in case he the Deft performed a certain piece of work, the note should be void. The Pltf may demur to this plea, yet not admit that there ever was such an agreement; for in law this parol agreement can never be proved to destroy a writing

Wherever there is a demurrer it reaches the first defect. If the declaration is substantially bad, the plea frivolous, & the Deft demurs to the plea, the demurrer reaches the declaration, & it will be adjudged insufficient; or as our Lawyers improperly say the plea will be adjudged insufficient.

Hob. 56
Salk. 561.

A part of a declaration may be demurred to & the gen issue plead to the rest; but the whole must in some way or other answered, for what is not answered is admitted

Co. Lit. 72

A special demurrer does not decide the merits of the cause, but the judgment is in chief or completely different of that declaration. As if A is indebted to B 20£ - B. sues A for 30£ upon a special demurrer by A the judgement is rendered for the whole 30£ - On Eng the Deft moves for a Jury of inquiry who estimate the damage; & reduce the sum given in the first judgmt from 30£ to the sum which is really due with costs. In C. our Ct act as a Jury of inquiry to assess damages -

When the damages are certain and only interest & costs is to be computed the Clerk of the Ct does it. We have no stat authorising our Ct to assess damages as a Jury of inquiry but it is our practice.

When one of the parties has demurred, & finds that upon the demurrer the case is like to go against him, the Ct will permit him to take back his demurrer & put in another plea.

2 Burr. 820 — 2 Wils. 173 —

Demurrer to Evidence. One of the parties adduces the testimony to a writing, & by the demurrer admits it to be true, but denies that it is sufficient in law to support the issue. When the evidence is demurred to the Jury are dismissed. In this demurrer neither party can be compelled to join. In other ordinary demurrers a party must join.

Co. Lit. 72 — 5 Coke. 104. — Cro. Car. 143 — Cro. Eliz. 752

A demurrer to evidence is the same as a special verdict by a Jury.

Plea in Bar. This plea admits the Plfs right to his action, & his claim to be good even if not for the Deft's excuse which he alledges is a good & sufficient reason why the Plfs claims should not be allowed. In all most special pleas may be given in evidence under the gen issue. But it will not do to plead specially a set of facts which amount to the gen issue on a flat denial. In Eng the Deft court, in such a case be compelled to plead the gen issue

The plea in bar must cover the whole declaration; & if it is not a compleat answer to the Plfs whole declaration, it will avail the Deft nothing: As where an action is brot for money lent & received for 100 £ & the Deft plead that the Deft made full payment for 90 £ & says nothing by way of confession or otherwise for the other 10 £ judgment will go agst him for the whole sum. But the real damages may be enquired into

Cro. Eliz. 434
2 Mod. 289
Cro. Jac. 97

The Deftts plea must not be double; i.e. there must not be contained in it two distinct independent matters either of which would be a good defence; & which require different & distinct answers. It is double pleading if one of the pleas are defective-ly pleaded.

Hob. 295
Co. Lit. 303.
1 Sid 175

If there are two pleas & one of them is no defence at all, it is not in double pleading, tho in Dyer Plowden it is considered so.

Dyer. 126.

When one of the pleas comes by way of endorsement it is not double pleading; as when a suit is commenced by a married woman, & a release given by the husband, it is good pleading to state that she married & that her husband executed a release, tho it then is a good defence.

Moore 25.

When there are two pleas which extinguish the Pltfs demands it is not double pleading.

Co. Lit. 304
Co. Eliz. 87.

When there are more Deftts than one they may plead separately. This subject of double pleading is a matter of form & can be taken advantage of only by a special demurrer.

1. Saund. 337.

2. Cok. 4
Lock. 16
1 Lion. 190

The plea must be certain when it is not to plead in bar. See Bacon in Comyn in certainty of pleading.

When a plea in bar is defectively stated, it may be cured by a replication of the Deft which admits the plea in bar to be good, or which is itself defectively pleaded & demurred to by the Deft. Not certain that the above principle is laid down right.

2 Wood. 291.

Replication. Any plea in bar may be avoided by the Pltfs replication. Upon the traverse the parties are at issue; & the point to be decided goes to the Jury, except a record or pleadings which must in all cases be tried by the Court.

Where there is a traverse the replication the conclude with an averment. If there is a traverse of the whole matter it immediately goes to a Jury without the necessity of any further averment.

Strang 871

Departure.

Departure is the allegation of some new matter no way consistent with what has been before alledged by the same party; & which does not tend to strengthen his former allegations: as where an action is brought for breach of covenant, the Deft pleads performance. The Pltff replies by pointing out a particular breach. The Deft again by saying that he tendered performance. This is a departure from his first allegation of first performance.

Co. Dr 76
1 Sid. 72

A NARRAL which is a denial of what has been before alledged by the opposite party is always in the form "without that" Any thing left contravened or unanswered in any other way stands confessed.

The traverse, if made by Deft, must be done so effectually as to leave no room for the Pltff's claim. Eg. Pltff it must be so full a denial of the Deft's plea that it cannot bar the Pltff's claim. Further a man is sued for the nuisance of stopping the light of his neighbour's lights. The Deft traverses, without that he stopped the light of the Pltff's lights

he ought to be barred of traversing & maintaining his action; but if he had stopped short on the Pltff ought to recover

Cro Ja. 225

There must be a traverse upon a traverse; but the other priority must join issue. This rule is not without exceptions: as where the Pltff sues for a debt paid committed the 1st of May — Deft pleads a lease & traverses the time before — Pltff may follow by traversing the lease

When some immaterial point in the pleadings is traversed, the proper way is to demur to the traverse.

When the Pltff has traversed an immaterial plea in bar, & the verdict is found for the Deft, the Ct cannot then render judgmt for Deft but must give judgmt for Pltff. But when the Pltff has traversed an immaterial part of a good plea in bar, & the Deft does not demur, as is the proper way, but joins issue & the verdict is agst the Deft the Ct will order a repleader

1 Bur. 292
Strung. 994.

A Protestando, is, as Coke expresses it, an exclusion of a conclusion. It is only protesting to certain facts

Of granting a new trial.

Salk. 278
Due. in Ch. 7. 1691
Strange 691

The first cause for granting new trials is the discovery of new & material testimony. It must be such as could not have been had at a former trial. In the petition for a new trial must be stated what the witnesses will say, that the Court may judge of the materiality of the testimony. If the testimony stated is insufficient to procure a new trial it is a cause of demurrer.

2. If that a material witness in fact was absent without any fault of the Petitioners. Here also the testimony must be stated for the same purposes as before. It must clearly appear that the cause was which prevented the Findam of the witness before.

6 Mod. 22
Salk. 645

3. That a witness whose testimony was credited had been convicted of an infamous crime. But there is a difference in Law & Eq.

Salk. 653
Due in Ch. 4. 1694

It is no ground for a new trial that the witness thro' forgetfulness forgot any material part of his testimony.

4. If the trial was too nearly related to one of the parties a new trial shall be granted. But not granted if the party knew of the relation that at the former trial

1. Vent. 30

5. If the verdict is contrary to the evidence a new trial will be granted. But this rule must be qualified. Tho' the weight of the evidence is contrary to the finding, yet the Ct will not grant a new trial. But when it greatly incroaches agst the verdict a new trial will be granted. If equity has been done by the verdict tho' contrary to law, yet the Ct will not open the case

Strange 442.

Salk. 644. 646. 647.

Nor will it be granted in a vindictive action where the damages have been trifling.

2 Bur. 1244.

6. Excessive damages may be the ground of a new trial. But a Ct will seldom grant a new trial on this ground

2 Wils. 244. 252

Strange

7. Smallness of damages is a ground of a new trial. But smallness of damages in a trespass action, as slander, is no ground of a new trial

Strange 1. 251
Salk. 646

8. In any misconduct of the jury, as setting lots for the verdict &c. is a good ground for a new trial, whatever may be the opinion of the c. with regard to the equity of the verdict.

Sid. 235
Co. Eliz. 189
Strang. 642

9. In misconduct of a party by bribing a witness to stay from court. It is not a cause of new trial that the jury agreed to bring in a verdict by a majority of votes. Neither is the negligence of an Attorney.

10. That the verdict was against law. This is when the parties are agreed in all the facts; but there is some illegal construction put upon some fact. In C. new trials are never granted for this cause

Dyer 23.

12. That the Judge may direct the jury, on refused proper testimony. No new trial to be granted in a penal action, unless where there has been some fraud practised by the Defdt.

Hang. 899
1298.

13. In this case where the party is misleaded & mistaken his defence. A new trial shall not be granted to let in a party contrary to the equity of the case; as the stat of limitations, &c.

The petition must state that there is a good defence yet, & shew what it is. It is no objection that he knew of this defence on the former trial; for he might have had two defences & elected the wrong thro ignorance. But if there is a point which has often been decided & the Defdt makes that his defence, the Ct, if they follow precedent, will consider it as no defence & act accordingly. In this case, no new trial shall be granted altho the Defdt shewn another good defence. When the Defdt sets up a defence that clears clear of the merits of the case, if he fails on that ground no new trial will be granted.

scire facias, is a writ which always presupposes an original judgment that gave birth to it. It is as much a judicial writ as an execution, because it grants no new judgment.

When anything has happened whereby the party cannot have the full benefit of his ca^se, even if this is the fault of the Ds himself, a *scire facias* lies. It is signed by the Clerk, returned to the Court from whence it issues. The *scire facias* may be for a greater sum than the Ct, out of which it issues has jurisdiction of. As a judgment of a Justice of the peace for four pounds damages is known & one pound costs, here the *scire facias* issues for 5 £, which is more than a Justice has jurisdiction of in an original action.

The most regular case for a *scire facias* is agst ca^se. Issues ⊂B. ca^se of C.B. gets judgment agst the property of I in the hands of ⊂B. but ⊂B. will not turn over the

inherity. A takes out a scire facias agst B himself, counting on the same judgmt praying an exn agst B de bonis propriis. The judgmt is, that the Pff have a new exn.

It is a gen rule that nothing can be pleaded agst the scire facias which might have been pleaded agst the original suit. The defence must always be founded on something which arose since the first judgmt. But an exn that may be sued out upon a bail bond instead of bringing an action of debt. But the treats such recognizances or bail bonds as a species of judgments in the nature of that staple & such like confessions of indebtedness.

The scire facias if upon a recognizance in the Sup Ct may be tried to that Ct. It is a gen rule, that when the scire facias is sued out agst the same person, or his representative, agst whom the first judgmt was rendered, no appeal lies. But when the scire facias issues against a person who was not privy to the original suit an appeal is allowed. The practice is not to attach upon a scire facias but no good reason appears agst it.

An audita querela, is not a writ of common right; & it is always the duty of the Judge to grant some kind of a parte hearing, by examining the petitioner of the appellant, before he grants the audita querela, that he may be satisfied that there is probable cause. This writ is always to be signed by the Chief Judge of the Com. Pl. unless he is incapable or absent, then it may be signed by any of the Judges.

This writ is a complete supersedeas to the exn; & the Pltff. of the audita querela sueth, has recourse to his bond.

The audita querela is a good ground for an action to recover all damages the Deft has sustained on account of the exn; and for the recovery of money paid upon the exn.

A Mandamus is a writ issued by the Sup. Ct. only. It lies for any person aggrieved to compel the lower Court or a ministerial officer to do his duty, or to do some act which appertains to his office, & which he has refused to do. The person moving the Ct for a mandamus must make oath to the facts alledged. The first writ is a command to the officer or lower Ct to do the thing required by the writ or show cause. If a sufficient cause is returned, nothing further is done

But if the reason be adjudged insufficient a peremptory mandamus issues which if disobeyed, the party disobeying will be punished for a contempt; for here the honor of the K. is concerned, & an attachment will be granted to confine the person in prison till he will comply.

But if the officer make a false return, as it stood at com. law, nothing further could be done upon that precept; but the officer may be sued for a false return; & very great damages would be given if he was found guilty. But by the stat. of Wm & Mary principles have been adopted by our Cts, the party has a right to traverse the return. This is tried by a jury; & if found agst the officer, a special mandamus issues & an Eng damages to the party, at the same time, assessed. No instance of assessing damages has occurred here.

Habeas Corpus is a writ of com right for any one imprisoned under color of authority or without it, except he be imprisoned upon an exd or conviction of a crime. This writ issues from the Sup. Ct. directed to the person of the complainant to bring him before them, with the cause of his commitment specially stated — if the man refuses it is a contempt

This writ lies for a wife when confined for a by her husband. When liberated, if the husband again confines her, it is a contempt. As for a servant, child &c the one who is imprisoned by legal process, (except in the cases mentioned) has a right to this writ even tho imprisoned for murder. When he is brought before the Judge or Judges, they decide upon examination to discharge, remand, or bail. In case application is made to the chief justice, or in his absence, to one of the Assistant Judges.

A Writ of Prohibition is a writ which the S. C. issues to prevent any further proceedings in an inferior Court in a case of which they have no jurisdiction. This writ is directed to the inferior Court and the prosecuting party. This writ is granted in consequence of a petition from the defendant, stating the cause of action & showing the incompetency of the Court before whom he has been arraigned for trial. If the

inferior Court are convinced upon the pro-
hibition that they have no jurisdiction of
the action, they attempt to go no fur-
ther. But if otherwise the inferior Ct make
a return to the Supr. Ct of the action before
them, which will be considered as a true re-
turn, & the question of jurisdiction is
then argued before the Supr. Ct. If the
Supr. Ct are of opinion that the inferior
Court has no jurisdiction of the cause the
judgment is Let prohibitio; but if otherwise,
they grant a writ of consultation, which
is a permission to proceed in the trial of
the cause.

1770

A comparison of the English Law and Laws of Connecticut.

Husband & Wife.

Eng. Law — 1. The husband acquires an absolute right to his wifes personal property.

Con. Law — 1. The same. —

Eng. L — 2. His right to her choses in action is an absolute right to dispose of them as he pleases. But if he does not reduce them to possession during coverture, & he dies first, they revert to her.

Con. L. — 2. The same

Eng. L. — 3. In event of the wifes dying first the husband is entitled to the administration of her choses in action without liability to account. This is by Stat Charles 2. Not so at com law. At com law they went to the Adm^r, or, if she made a will, to her Ex^r. By com law he had the power of making a will of these things, & shall have unless it is taken away by the Stat referred to; but if the husband neglects to take out administration the com law will obtain.

Con. Law — 3. The com law is the rule with us.

Eng. L — 4. Judgement obtained by husband and feme, & either of them dies before collection they go to the survivor.

Con. L. — 4. The same. The ex^r requisite not known

Eng. L. — 5. The chattels real of the wife, in the event of the husband's dying first, go to the wife. The ground of it is that the husband & wife are joint-tenants & they survive to the wife by the jus accrescendi.

Com. Law — 5. The Law is the same, but the grounds of it different. The grounds are the same as in choses in action.

Eng. Law — 6. In the event of the wife's dying first chattels real go to the husband by jus accrescendi

Com. Law. 6. As the jus accrescendi is not known to our law, & there is no good reason why they should not, as choses in action, go to the Adm. or Ex. of the wife —

Eng. L. — 7. The real estate of the H. remains his notwithstanding the marriage; but during the coverture the H. is entitled to the use of them

Com. L. — 7. The same —

Eng. L. 8. In the event of her dying first, the real estate descends to her heirs at law, under the incumbrance of the husband's curtesy, if the requisites to give the H. an estate by curtesy follow; if not it descends to her heirs at law without that incumbrance.

Co. Law. 8. The same —

Eng. Law — Q. In Eng the H. unity lasts as long as the lives.

Con. L. — Q. It is a question whether it lasts the unity longer than such time as the lives of her body comes of full age. If there is no such heir our law is the same. This doubt is occasioned by a decision of the S. C.

Eng. L. — A. The wife may with her husband convey her real property, provided it be done by fine & recovery; in which case she must be privately examined.

Con. Law: A. She may do the same by ordinary mode of conveyance.

Eng. Law. — A. The H. cannot convey her real estate to commence in futuro without her H. for the maxim is that a freehold cannot commence in futuro. But if she convey without her husband by fine and recovery it binds her & her representatives, & is every way valid as to the grantee.

Con. Law — A. I see no reason why she may not, without her husband convey her real property — the consequence to accelerate the H.'s estate in unity is indeed; for the maxim is relaxed to have been modified by decisions of our Cts & entirely done away by a Stat.

Eng. L. — 12. The W. cannot devise real estate, being prohibited by stat. of Henry 8.

Com. Law. 12. It is disputed, the one decision in its favor.

Eng. L. — 13. At com law the H. cannot, by any possibility, keep the real estate of the W. for any longer term than his right to the whole continues. But by stat. of Henry 8. he may together with his wife so keep it that it shall it may last longer, provided he pay the requisites of the other party.

Com. Law. 13. Contra in the com law.

Eng. Law. 14. The wife on the death of the husband, and after his debts are paid, entitled to one third of his personal estate, if there are children, & one half if there are none. But if he intestate he may devise away the whole, except the widow's paraphernalia. This distribution is by stat.

Com. L. — 14. The same has a similar stat.

Eng. Law. 15. The wife is entitled to dower in all the real estate of which the husband was seized during the coverture, provided the estate was so circumstanced that the wife could have been endowed out of it. This estate she cannot be deprived of by the devise of the husband or by the act of creditors.

She may join with the husband in a conveyance & thus defeat her dower

Com. Law. 15. By our law she is endowed of such land only as the husband died seized of, & that.

Eng. Law. 16. The husband cannot devise away the right of paraphernalia, tho he may dispose of them during coverture, & they are liable to creditors when the personal estate is exhausted; but not untill that time. Even then, if it has been exhausted by specially creditors, who might have come upon the real estate, she shall come upon the real estate to the extent of such specialty debts taken out of her paraphernalia, if such is necessary to satisfy them.

Co. Law. 16. The same, only the real estate either is liable for the debts.

The principle of law is that such claimants must yield to creditors, yet shall be preferred to distributees.

Eng. Law. 17. The husband with the wife is liable for all her debts contracted while sole, & collected during coverture, but not otherwise.

Com. Law. 17. The same

Eng. Law 18. She is liable for all torts & crimes committed while sole, if sued during coverture.

Com. Law. 18. The same.

Eng. Law — 19. The husband is liable, civiliter for all torts committed by his wife during coverture in his absence; & without him, for that committed in his presence & in company with him.

Com. Law — 19. Same

Eng. Law. 20. The wife can have separate property of her own, real & personal in the former case, the husband is not entitled to the usufruct; nor can he, in any manner intermeddle with her personal estate. The latter she may devise, but not the wife being prohibited by that. She may acquire a separate property by settlement of the husband upon marriage; & by the intervention of trustees after marriage. In some cases a direct gift from the husband to the wife has been supported in Equity. It may be acquired by the wife or devise of any other person to her use.

Com. Law 20. Same, only the wife may devise her separate real, property.

Eng. Law — 21. There is a custom in London in derogation of the com. law, that a feme covert may be a trader as a feme sole.

Com. Law — 21 No such custom.

Eng. Law. 22. A feme's dower may be barred by jointure settled on her before marriage; or after, but with her working abandoning it for her dower.

Com. Law. 22 Same.

Eng. L. ... 23. A cointure must be a freehold.

Com. Law ... 23. But that leaves some to doubt whether a cointure may not be of temporal estate as well as real. If it can it may be a curious question what kind of property the wife does in such cointure during the coverture. It seems to be reviving the old common law doctrine of extremes in fee, which law, as we learn from Hargrave & Lundavore, an indowment of freehold requisite, & yet that such property of the wife was hereditable. If this she might make a will, it being, as they expressly, her own property.

Eng. L. ... 24. Stealing & living in adultery a bar of dower

Com. L. ... 24. Same.

Eng. L. ... 25. He is liable to bills on contracts made she is equal for her to make them & he furnishes them. He is liable when articles come to her up in the use of the family, except in some cases of extraordinary conduct on the part of the wife. If a man be transported abroad, he is liable on her contracts for necessaries. When he abandons her, he is liable for her contracts for necessaries for herself and family. It is not in his power in that respect to prevent his liability by forbidding persons to trust her. She is not liable when he with leaves him without a cause. They should be not be liable if he leaving him is with reason? She is not liable when they are separately of their own.

Com. Law - 25. Same -

Eng. L. - 26. A feme covert living with her husband having separate property, is liable for her contracts to the extent of it.

Com. L. - 26 Same -

Eng. L. - 27. A feme covert separated from her husband by articles of separation, & having a separate maintenance is liable for her contracts to the full extent.

Com. L. - 27. No good reason why this should not be our law. Probably is

Eng. L. - 28. The marriage of the wife alone when the husband is abjured the realm, is banished, is transported or is an alien enemy -

Com. L. - 28. Same.

Eng. L. - 29. When there are articles of separation, it is a complete renunciation of all marital rights to the extent of the articles; & always implies that the husband is no longer entitled to her services or her person, & cannot restrain her of her liberty

Com. Law - 29. Same

Eng. Law - 30. If the husband on his part covenants to give up all right that he shall in her property, such property she can effectually convey without him -

Com. L. - 30 Same

Eng. L. --- 31. The husband is not liable for the wrongs of his wife criminaliter unless for her assist. or theft committed by her in his presence or company.

Com. L. --- 31 Same

Eng. L. --- 32 The wife is liable criminaliter for her own wrongs except in the cases above.

Com. L. --- 32. Same

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33. For an injury done to the person or reputation of the wife she is entitled to the damages.

Com. L. --- 33. Same.

Eng. Law --- 34. In such cases if there is any special damage to him per quod consortium amisit or any loss of property, he alone is entitled to an action.

Com. L. --- 34. Same

Eng. L. --- 35. For an injury to her real property, if it affects the inheritance, or a damage to her fruits, she is entitled to the damages. If it affects the usufruct only as emblements, he is entitled to the damages.

Com. Law --- 35 Same.

Eng. L.... 36. The wife cannot be joined with the husband in any case or suit where the debt, duty, or damage would survive to the wife on the death of the husband.

Con. L.... 36. Same.

Eng. L..... 37. The husband alone regularly brings the action where the debt or duty would not, in the event of the husband's death survive to the wife. It seems to be admitted that he may join the wife in cases where her property is the meritorious cause of action.

Con. Law. 37 Same

Eng. Law. 38. If a feme covert brings an action alone which would survive to her, if her coverture is not pleaded in abatement no advantage shall be taken of it in bar.

Con. L.... 38. Same.

Eng. Law. 39. If a feme sole sues & marries she abates her suit.

Con. L.... 39. Same

Eng. L.... 40. If a feme sole is sued & marries the suit proceeds

Con. L.... 40 Same

Eng. L.... 41. Feme sole owes debts & marries, are not collected during coverture, they survive against her

Con. L.... 41 Same

Eng. L. . . . . 12. The action must be brought against H & W where the right of action would survive against the wife in the event of the husband's dying first

Con. L. . . . . 12. Same

Eng. L. . . . 13. The husband's estate is under the incumbrance of a mortgage, & redeemed by the separate property of the wife. The husband dies the wife shall retain in the value of the mortgage, & the heir shall not hold it without redeeming it

Con. L. . . . 13. Same

Eng. L. . . . 14. The husband may dispose of his wife's paraphernalia during coverture by grant gift deed, & tho not by will; yet if such disposal be only a fraud she shall have it. If the is estate sufficient arising from the lands not at time the other are to be paid she shall be entitled to so much of the surplus, as may be necessary to redeem her paraphernalia, before any distribution is made

Con. L. . . . 14. Same

Eng. L. . . . 15. It is a general rule that all contracts entered into before marriage by H. & W. are extinguished by the marriage; yet marriage settlements have been supported in equity without the intervention of trustees

Eng. L. . . . 15. Same

Eng. L. - - - 16. It is a litigated question whether a bond given by the husband to the wife w.r. it sole, in contemplation of marriage, which by the conditions could never be due till the death of the husband, is a bond conditioned to pay money to her with a certain, or if the marriage extinguished, or not. Such bonds have been such holden in a court of Law; but however they may be considered in Law, they will be supported in Equity.

Con. L. - - - Same.

Eng. L. - 17. If it be a fine sole in marriage was held to be in effect a revocation of a conveyance to a settlement, a marriage is a revocation of the commission.

Con. L. - - 17. Same.

Eng. L. - - 18. The Law cannot be witness for or against each other, either in a civil or criminal case, altho all parties are required to give their testimony. So this rule the case of Treason is an exception. So is the case of Threats made to the wife, or fear of avoid by the husband. Strang. 638 So to bind over the husband to keep the peace.

Con. L. - 18. Same.

Eng. L. - - - 19. A marriage is held to be absolutely void if the requisites of the stat. of 26. Geo. 2. are not complied with, which requires among other things that it shall be celebrated by a person in orders with the exception of Jews & Quakers.

Con. L. - 19. The stat regulating marriages does not in terms declare a marriage void who. over may celebrate it. It only declares that no person, except a clergyman

same magnitude, & those within certain precincts. I believe that the general received opinion is, that if any other person should perform the marriage ceremony it would be void. The stat. also requires publication of banns & consent of parents. I believe that nobody can maintain that where those ceremonies are neglected the marriage would be void. I am not at a loss why it should be in the former case. There is a penalty affixed to the former & not the latter transgression. But when one is guilty of a breach of the stat. he is punishable for a misdemeanor, tho no penalty is affixed.

Eng. L. — 57. The person performs the ceremony by virtue of authority derived from the stat. & not by virtue of his clerical character.

Com. Law — 58. The same: otherwise the power of marrying would be merely a extension with the power of preaching the gospel.

Eng. Law. — 59. The stat. of Henry 8th enacts that any person may marry who are not within the Levitical degrees, & unless God's Law prohibits, which is construed to extend to cases of former marriages with husband or wife living, as the case may be, precontract or impotency. In all these cases the Ecclesiastical Court will grant a Divorce a vinculo matrimonii; but in none of them except the former marriage is absolutely void. If no divorce is had during the coverture nothing shall impeach the marriage to bast=

adize the issue. But if a Divorce is had during the coverture, it goes upon the ground that the marriage was void ab initio & the issue are deemed bastards. In supervenient causes, as adultery, proofs mutuum et contra a Divorce is had before the same court, but it is a moment of thought. The issue is not bastardized. The Ct may also give the wife alimony & allowance, in some cases of adultery, grant divorces a vinculo matrimonii.

Con. Law. 51. We see that the causes of Divorce are fraudulent contract, 3 years wilful desertion, 3 years absence, & adultery. The Supr. Court grant Divorces in these cases a v. m. but the issue are not bastards. In cases of proofs mutuum et contra the G. Assembly grant Divorces either a vinculo or a mensa, and may grant alimony. The S.C. where they dissolve are empowered to grant the innocent wife a part of the husband's estate, not exceeding one third part. She is entitled to Dower. It is observable that our statute is silent as to precontract or imbecility, unless included in the terms ~~[illegible]~~ fraudulent contract. As to former marriages, living the husband or wife, the second is void & needs no Divorce. All marriages within the Levitical Degrees absolutely void, excepting the sisters. Esther

Eng. Law. 52. If H. & W. are divorced a vinculo and the wife has a child, & it is in proof that she by her former husband, yet it is a bastard. Secus, divorced a mensa et thoro has a child, the presumption of law is that

is a bastard. If it is in proof that she by her former husband is legitimate. If the husband & wife live separately by articles of agreement, & the wife has a child the presumption of law is that the child is legitimate, & nothing but impotence or long absence on the part of the husband can bastardize the child.

Com. Law — 52. Probably the same.

Eng. Law — 53. When upon the marriage a settlement is made upon the wife by the husband (not as a jointure in lieu of dower), the husband is considered in equity as the purchaser of the wife's portion

Com. Law — 53. Probably the case has never been before our Courts.

Eng. Law. — 54. The wife by marriage does not gain a new settlement; & tho her former settlement is said to be suspended during the coverture, yet on determination of the coverture it again revives.

Com. Law — 54. I believe the received opinion in this State is that the wife by the marriage with the husband gains a settlement with him; at least after having resided at her husband's settlement one year.

Accent & Child

Eng. Law. 1. Every Child not born in lawful wedlock or at a convenient time after is a Bastard.

Con. Law 1. Same.

Eng. L. 2. The Child may be a bastard tho born in wedlock. The principle by which to ascertain this fact is that the child should be a bastard when access of the husband was impossible. But in the application of this principle it was formerly held that there could be no other evidence of impossibility of access than that the husband was not in the quatuor maria; but a more rational rule now obtains. Any evidence of absolute impossibility of access is admissible: as that the husband was in another part of the country &c, But in this case, probabilities weigh nothing; for if the wife lived in adultery with another man; yet if there existed no impossibility of access the child is legitimate.

Con. Law 2. Same.

Eng. Law. 3. When the imbecility of the husband, the Child is a bastard, if it is demonstrable.

Con. Law 3. Same.

Eng. L. 4. But it seems, if a man marries a woman with child by another man the child is not a bastard.

Con. L. 4. Know of no such case determined by our Cts.

Eng. L. 5. A Bastard cannot inherit to any person. The maxim is that he is filius nullius; so that there cannot be any person to whom he can inherit.

Com. L. 5. Domestic policy may prevent a bastard from inheriting from the parents, as legitimate children do; but when no such policy stands in the way, as when the mother dies unmarried having property, & leaving a bastard child, they should not the child inherit. I know of no case determined in our Cts materially agst the decision of the Eng. L.

Eng. Law 6. A Bastard child cannot be inherited to unless by his own children & their issue.

Com. Law 6. The same, unless it should be thought reasonable that when there is no issue the mother surviving should inherit.

Eng. Law 7. A Bastard may acquire property by a man purchased by acquisition. But no such limitation or grant to the eldest son, child of such a person, ever vests the estate in the bastard, tho he is the eldest son — not if limited to issue bastard or not bastard.

Com. Law 7. I know of no case determined by our Cts.

Eng. Law 8. When there are bastard eigne & mulier puisne, the bastard enters, & dies seized, his issue
2. Black. Com. 251 cannot be disturbed of their title by the mulier or his issue.
Com. L. 8. Never yet was determined

Eng. L. 9. The settlement of a Bastard is the place of his birth.
Com. L. 9. The settlement of a Bastard is the settlement of his mother, by a decision of our Court.

Eng. L. 10. Infants are not bound by their contracts generally, except for necessaries. The articles must be those which are necessary for the infant in his then circumstances, that is, he will not be bound by a contract for necessaries if he is then under the government of a Guardian, Master or Guardian & that government is duly exercised.
Com. L. 10. The same Law. Since that on the subject, I apprehend, is in affirmance of the common Law.

Eng. L. 11. The Article must not only be necessary but suitable to the infant's rank & of a reasonable price, i.e. he shall not be bound to pay more than such price.
Com. L. 11. The principle the same.

Eng. L. 12. Neither an infant is bound by his contracts for necessaries as before explained, yet such securities given by him as preclude an enquiry into the consideration are void. Upon this principle it is, I apprehend, that bonds with penalties are void when given by an infant. Negotiable notes & bills of exchange when given

by infants are void; but when no such usage on exists, then their securities given by infants for necessaries are good; so a note not negotiable, & a single bill.

Can. L... 12. The principle the same, but we have inadvertently considered bills for necessaries good. But since, with us the consideration of notes cannot be enquired into any more than bonds in E.g. to have the second the Lawyers ought to have considered such notes void, or else in such case to have relaxed such & inquired the consideration to be enquired into.

Eng. L... 13. Where such security is avoided the contract revives.

Can. L... 13. Same.

Eng. L... 14. Whatever an infant does, or any thing which would have been competent to do in Chancery is considered as well done, & cannot be afterwards.

Can. Law. 14. Same.

Eng. L. 15. No Decree will lie in Ch.ry against an infant without giving him a reasonable time to contend against it after he comes of age. In Eng. this time is six months.

Can. Law... 15. Same.

Eng. L... 16. Contracts of any kind by infants or for necessaries, whether they relate to the realty or personalty, are valid & voidable. The principle by which this subject is governed is that the infant may at his choice rescind such contracts, without any setback any part to the contract is more a part one or more.

This privilege is given to them to be used as a shield to defend them against injustice, but is not intended that they should use this privilege as an engine upon to do injustice.

Com. L. 16. Same.

Eng. L. 17. Contracts which exceed the personality, generally are not void but voidable, but should he, after he comes of age, confirm such contract by a new promise, or any act evidential of his consent to it, such contract would be valid. Qu. if it should be necessary to consider such contracts as void, in order to give the infant that protection which his minority entitles him to. In such case his contract is void; as if he should incur a forfeiture by such contract. In such case the law considers the contract as void to protect the infant against the forfeiture.

Com. L. 17. Same.

Eng. L. 18. It is a settled rule that infants contracts are only voidable, qu. if it means if he sells any property & delivers it into the other hands, he cannot hold the property as a bailee after, but must command his property, & then will be entitled to his action. But if he sells & does not make an actual delivery & the vendee takes it by force of the sale such vendee is liable in an action of trespass vi et armis.

Com. L. 18. Perhaps if a case which recognizes this principle is at hand it may be unfounded. Qu. since one is to be considered as a trespasser in both cases or neither. If the infant sold & had his property taken away from him by force, he might take it back as he could find it.

Eng. Law. 19. An Infant's conveyance by fine and recovery is not void, but voidable by the infant during his minority, but not after. If, when at a loss at the infant's privilege should be taken advantage of, it are known fine is a two-fold, which Eng. Lawyers seem to suppose an good one. It is doubtful, say they, whether judicial act in law is to be taken in relation of the infant, & they suppose that an Eng. Lawyer have sagacity enough to know whether a person is an infant or not by looking at him; but if he was a minor of full age, they will be at a loss to know whether he was an infant at any particular former period. It would appear it a little easier to look at the register of the infant's parents, neighbors &c than to run to the spirit of the Cambrian & Physiognomy. The other reason is that in real cases with a monstrous evidence. This is incomprehensible. If true it must prevent the avoiding the conveyance during the minority as called after.

Con. Law. 19. It seems no such conveyance is fine and recovery, & we know none of the mischiefs attending it.

Eng. Law. 20. Their conveyances of real property are void except in fee simple which is only voidable. This is analogous to the actual tradition of personal property.

Con. Law. 20. So conveyance by feoffment. In other cases probably as the Eng. Law.

Eng. Law. 21. The infant de when 17, years of age is bound by what he does as ex; unless he acts indiscretely, contracting a debt without receiving it, & thus subjecting himself to a Devastavit. In such case he shall have his privilege & rescind his contract.

Con Law 21. same

Eng. L. 22. An infant sells a horse & takes the money for him or buys an horse & pays the money for him & then rescinds the contract, shall he claim the money & recover the value of the horse in one case & return the horse & recover back the money in the other case? Depends upon the current of Eng authorities we may. This is not in a court by pronouncing the contract is rescinded it is as if it had never been. So, presumption of a gift to the infant can not any proprietor be inferred in mutuando

Con L. 22 Know of no case in which this point has been determined.

Eng. L. 23 A contract for money loaned to an infant to be laid out in merchandise, which is actually so laid out; may or Law be avoided, but in Equity it be supported. This distinction Reeve thinks unreasonable & unfounded.

Con. Law 23. Probably undetermined.

Eng. L. 24. Infant may rescind their contracts, except contracting with their parents, tho' on bound, if the infant chooses to abide them to their bargain.

Con. Law 24. same

Eng. Law ... 25. If the infant makes partition and it is an equal & fair one, he cannot avoid it, for in that he is compelable to do it. If it is unequal & unfair he may avoid.

Con. L. ... 25. Same

Eng. L. ... 26. An Infant bais, Mortg.d by deed, on the Mortg.r payment of the money, he cannot avoid, for this he was compelable to do in Eq.y.

Con. L. ... 26. Same

Eng. L. ... 27. Altho the rule of law is that the infant or his representative, may avoid a contract made by the infant, yet if an infant (an age to dispose of his personal property, that is at 15,) should devise this property to pay off this contract, as the infant had full power to devise, the Ex is compelable in Equity to pay it. I see no reason why the rule should not be the same in Law as Equity, this whole matter being placed on record.

Con. Law ... 27. Know of no case in which this point has been determined. The age of disposing of personal property is wanting.

Eng. L. ... 28. An infant of the age of consent to marry, which is 14, may covenant to settle any particular estate upon his wife & issue & equity will enforce such settlement.

Con. L. ... 28. Know of no case in which the point has been decided.

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Eng. L. . . . 29. An infant after 14 is liable for his torts civiliter et criminaliter.

Con. L. 29 Same.

Eng. L. . . 30. An infant is not liable in any case for torts civiliter or criminaliter under 7 years of age. From that time till fourteen he may or may not be liable, as he appears doli capax. It is said that the presumption is in his favor until 10. & against him after that age.

Con. L. 30. Same.

Eng. L. . . 31. An infant is not liable for slander till 17 years of age.

Con. L. 31. Same.

Eng. L. . . 32. An infant is liable for his fraud criminaliter but not civiliter.

Eng. L. . . 32. The distinction appehended is unfounded. If the infant is liable criminaliter it is because it was wrong. For the same reason he ought to be liable civiliter — not upon the contract but for the fraud which induced the contract. This point probably not settled by any decision of our Cts.

Eng. L. . . 33. Infants of 14 are liable for their wrongs; yet if the wrong is neither felonious nor treasonable, and especially, the infant does not act as a servant in a crime, it is doubtful if he be punished for a crime that is merely non-feasance: As if a fine is laid upon persons who do not build a bridge — an infant is one who should duly it was to build — he neglects, yet he shall not be punished.

Con. L. . . . 33. Same

Eng. L. ..... 34. Parents are bound by the contracts of their minor children where they expressly or impliedly allow them to contract. What shall be evidence of such implied assume is the difficulty. It is settled that where the children parted and came to the age of the Parent, & the contract is in the Parents business of such a kind as is usual for ~~minors~~ the minor to transact, & for the Parent to satisfy such transactions in such cases the minors contracts are binding on the Parent. In one case the Parent is liable, tho agst his express consent, where necessaries are furnished to an infant which the Parent refuses to furnish. Reason is that the proper action in such cases is assumpsit & it has been that the Parent gives the infant his time, & lets him shift for himself, could he then be liable?

Con. L. ..... 34. Same

Eng. L. ..... 35 An Infant gives a warrant of attorney to confess judgement agst himself the Court will, on motion, vacate ye judgmt.

Con. L. ..... 35. We never on such beneficial matter as that of the vacating a judgement. It should seem from that of we should perform the law of infancy entire, that we ought to consider such judgement as void, the warrant of attorney void & the person acting under it as a trespasser.

Eng. L. 36. Parents are not liable generally for the debts of their children. If they are done by their permission, if by or in the immediate execution of their business, altho done contrary to their will yet they are liable.

Con. L. 36. Same.

Eng. L. 37. Parents & Grand-Parents children and Grand-Children at any age are compellable to support each other in case of poverty; and where there is more than one, the proportion of maintenance will be according to their abilities. This is effected by Stat.

Con. L. 37. We have such a Stat.

Eng. L. 38. Sons in Law are not obliged to support their wives Parents. This has been determined by an adjudication of it not to be within the Stat.

Con. L. 38. We have a similar adjudication.

Eng. L. 39. A marries a pauper who cannot support her children. A is not obliged to do it.

Con. L. 39. I know of no decision on this point, but apprehend the usage is different.

Eng. L. 40. B. has an estate and is able to support her children then is A whom she married liable, but his liability determines with the coverture.

Con. L. 40. Same.

Eng. L. — 1. A judgment against an adult, & minor not having been sued by his guardian may be reversed in toto.

Con. L. — 1. It is only erroneous as respects the minor. This difference has been created by judicial decisions of our Courts.

Eng. L. — 2. As the parent is entitled to the service of the child an injury to him by which he loses this service entitles him to an action per quod servitium amisit.

Con. L. — 2. Same.

Eng. L. — 3. The last mentioned action is chiefly used against a person who debauches his daughter, & altho the loss of service seems to be the ground upon which the action is brought, yet the usual damages seem by no means compared with the high ideas. It is apparent that under cover of loss of service reparation is meant to be made to the wounded feelings of the parent & the disgrace occasioned by such a transaction. The loss of service seems to be regarded, as it ought, as the smallest injury.

Con. L. — 3. Same.

Eng. L. — 4. The Parent is entitled to an action on the case for enticing his child away out of his service.

Con. L. — 4. Same.

Eng. L. . . 45. As the parent is bound to maintain his children, an injury to his child a stranger has occasioned him or future will support an action on the case. If this injury arises from a loss of service it may be recovered in the action per quod servitium amisit, being stated on ground for special damages.

Con. L. . . 45. Same.

Eng. L. 46. A parent may correct his child with moderation. The only difficulty is to determine when he has exceeded those bounds. If into opinion of the triers, the child was corrected more than he ought to have been, or more than they would have done for the same thing, yet, I apprehend, this does not lay a sufficient foundation for an action. I conceive the parent acts in a judicial capacity, & for the mistakes of the understanding is not liable. But when his actions proceed from corrupt motives or in legal language acts maliciously he may be liable. The mode of punishment will furnish strong evidence of this malice, when it is of a cruel, & unusual nature.

Con. L. . . 46. Same.

Eng. L. 47. Parents may educate their children as they please with certain restrictions on their educating them in the popish religion.

Com. L. — 47. We have no such illiberal restrictions. Parents are however compellable to learn their children to read the bible, & to teach them the laws against capital offences. If they are unable to do this, to learn them by heart some orthodox catechism.

Eng. L. — 48. A parent may justify in defence of the child & the child in turn may justify in defence of the parent.

Com. L. — 48. Yes.

Eng. L. — 49. Guardians in chivalry are entirely extinguished.

Com. L. — 49. Never existed.

Eng. L. — 50. Guardian in socage where an ancestor dies leaving an heir under 14 is entitled to the fee of real property. In such case the person who is nearest of blood to whom the inheritance cannot by any possibility descend is guardian in socage. This guardianship extends to such real property, and the custody of his person but has nothing to do with his personal property. The law fixes that the ward is 14 years of age when such ward may elect his guardian.

Com. L. — 50. There is no such guardian in our law.

Eng. L. — 51. Such guardians are compellable in law to give bond, or to account annually & may be displaced by the Chancellor.

Com. L. — 51. No Law.

Eng. L. — 51. A Guardian may be appointed by will & such Guardian is Guardian of both real & personal estate, & of the person of the ward. A ward cannot elect his Guardian at 14. He shall be under control of a civil power as a Guardian in socage.

Com. L. — 52 There can be no such Guardian as we have in such Stat. The Common Law in Eng. depends upon a Stat. of Charles, 2d.

Eng. L. — 53. When there is an infant & the father is living he is the natural guardian & liable to be displaced as to the guardianship of his estate by the Chancellor, but not as to the person.

Com. L. — 53. Same

Eng. L. — 54. The father is dead & the mother is living, the ecclesiastical Court or Ct of Ch. appoints a Guardian, for the males each until they are 14. Then they elect their own Guardians, but subject to the ratification of the Ct. If no election is made then such Guardian remains till they are of age, & he is Guardian of both the real & personal estate of the person of the ward & subject to the control of Ch. J. On his appointment he gives bond for the faithful discharge of his trust. The mother is Guardian to females till twelve, when they may elect. If they do not elect the mother remains Guardian.

Com. L. — 54. Same Law, except that the Court of Probate appoints & no such distinction as that the mother is Guardian of the females.

Eng. L. . . . . 55 Father & Mother are both dead the Laws the same as to males & females, as stated in the preceding case as to males –

Con. L. . . . 55. Same

Eng. L. . . . . 56 & 83. In the succeeding part of this comparison of the Eng. & Con Laws no notice will be taken of either where they are alike. The differences only will be pointed out. Where no mention is made of either then they will be taken to be alike. It is considered equally tedious & unnecessary to pick down all the laws in either country as it is attempted to be for the most part remarked upon in the foregoing Lecture. Where the laws is esteemed different both will be pick down & in so doing the difference noted. This will a considerable abridge the labor and perhaps be equally useful –

A Guardian is liable to account with the infant. This he may be compelled to do by the infant during the guardianship by his prochein amy either in Chy or by an action of account Lars.

Con. L. . . 56 The general principles are the same, with this difference, that the common one made of called Guardians is by action of account at Law. I know of no reason why it may not also be done in Chy in the minority of the cot requires it. Probably accounting in a court of probate would be sufficient –

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8/8

8 8/7

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Lectures on Criminal Law.

The observations & authorities contained in the following Lectures will be taken mostly from Blackstone's C. Law, Jarvis's Crown Law & Hawkins's Pleas of the Crown. These authorities will be compared with our Laws, & their applicability, so far as in my power, pointed out. So far as I have yet run the Lectures taken by the Pleaders students have been too imperfect to merit any great attention. Please therefore excuse them, so far as they relate to Criminal Law - read the authorities & study for myself.

As the obedience to any law must, when regarded in a moral point of view, be voluntary in order to claim any merit, so the disobedience to the same law must be voluntarily in order to make the person obnoxious to any punishment. Where the will cannot act there can be neither merit nor demerit. A moral action can be applicable only to a being possessed of a will & of perfect liberty either to will to do a thing or not as he pleases.

Blackst. Vol. 21

Blackst. 2

Blackst. Vol. 21

Criminal Law — Incapacity

This being the case, when a person has gone contrary to any law we are to see that it was with a will wilfully offended, before we punish him —

In this subject we shall pursue Blackstone's order of treating it pretty closely.

In order to make a man obnoxious to punishment we have seen that the will must join with the act. There are three cases in which the will does not join with the act

I. Where there is a defect of Understanding.

II Where there is understanding & will residing in the party; but not with sanity & exercised at the time of the fact committed —

4 Black. C. 21

III Where the action is constrained by some outward force —

Criminal Law. Incapacity

1 When there is a defect of understanding.

1 Of Infancy.

The Civil Law & the Eng. com law are very nearly the same on this subject. The civil law is as a law of no force either here or in Eng. but we have adopted both as far as they are deemed applicable to our state of society. The Eng. com law is supposed to be drawn a large part of its rules on this subject from the civil law. Our law both St & Com is most of it taken from the Eng. com law, which is founded in reason & justice & as such we have adopted it.

A person is said to be under age to most civil purposes till he is past 21 but in criminal cases it is different. There are three periods by the civil law at which infants are competent to commit crimes or not commit crimes & when the presumption is against their guilt & in favor of it.

Criminal Law. Incapacity

4 Black c. 22. The first period is between birth & 7 years of age —
1 Hale 16, 17. second — between 7 years & 10½ years — third between
vet. Inst. 3. 20. 10. 10½ years & 14 years — This is their most minute division.
From birth till 7 years of age the infant is considered as absolutely incapable of committing a crime —
From 7 to 10½ the presumption is in his favour.
From that period till 14 years of age the presumption is against him. After that age he is conclusively doli capax.

Yale has made some still more minute
1 Yale. 17. divisions, but they are of little importance.

There is also in the civil law a more general division
1 infantia which ends at 7 — 2 pueritia ends at the
8 — from thence forward. By the Saxon laws in
capital punishments the division was still more
1 Hawk. 2 minute; but as all these divisions are disused, it
4 Black c. 23 is not worth the trouble of mentioning them.

The rule now adopted in our courts & the Eng. courts is to judge from the circumstances of the crime proved & the appearance of the infant whether he possesses a sense of the guilt of the fact committed or whether he is doli capax; for the maxim is malitia supplet ætatem. However under 7 years no court would convict an infant.

Criminal Law. Incapacity.

the presumption in favour of innocence increases in
Hale 25.27 inverse proportion to the years of the infant. The
younger he is the more strong the presumption in
1 Hawk. 1. favour of his innocence.

The laws of Eng. in some cases privileges infants
under 21 from being punished for common
misdemeanors. This is in cases where they cannot
have the command of their property to discharge
1 Hale. 22 their duty: as the mending of a bridge repairing
an highway &c

2. The second case of deficiency of the will which
excuses an offender from committing a crime by reason
2. 3 Inst. 2 b. of deficiency of understanding is that of idiocy or
lunacy. Whether the criminal is a lunatic or
1 Hale. 29- an idiot or a madman is a fact triable by the
2. Comm. 25. jury. In civil cases it is a maxim of the eng. law
1 Hale. 27 that a man shall not be permitted to stultify
2. Co. 128. himself to avoid his own act, but his heir or execu-
Co. Lit. 247 tor may. In criminal cases it is different.
It is always a presumption of law that a man is
1 Hale. 33 of sound memory, till the contrary is proved.
1 Hawk. 3. If a person is subject to lucid intervals, & has been
guilty of a crime he is presumed to have committed
1 Hale. 34 the offence in a lucid interval & shall be punished.

Criminal Law. Incapacity.

If a man commits a capital offence & before trial becomes insane. he ought not to be arraigned – if after the prisoner has pleaded he becomes mad he shall not be tried – if after judgmt he becomes insane he shall not be executed while insane – For as Coke says the execution of an offender is for example – ut poena ad paucos, metus ad omnes perveniat.

4 Comm. 25.
1 Hawk. 2
3 Inst. 6.

An idiot, or a person who was insane at the time of committing the crime shall not be punished – The rule of law is. furiosus furore solum puniitur

1 Hale 31.
1 Hawk. 3
4 Comm. 24.

A man who is surdus & mutus a nativitate is presumed to be an idiot

1 Hale. 34.

Criminal Law. Incapacity.

Lemm. 25 3. The third incapacity is artificial voluntary madness by drunkenness or intoxication, which deprives men of their reason, renders them in a sense incapable of any delict, & incapacitates them during a temporary lunacy. But our law books agree that this kind of incapacity is no excuse for a criminal. It rather aggravates than excuses his crime. If it were admitted as an excuse it would contradict a

Hutch. 3. received maxim of law, viz. no man shall be permitted to take advantage of his own wrong. It would be pleading one crime in excuse for another.

Lemm. 21. 26 4. This comes under the second general division. This fourth deficiency of the will in committing a crime is either of one committed by misfortune or chance. Here the will exposes a total neutrality & does not concur with the deed. The case is that if any accidental misfortune happens in performing an lawful act the party stands excused.

Lemm. 27 5. Ignorance is another excuse. Here the deed & the will do not concur. There is no will & intention. This must be ignorance of fact, not of law. Ignorantia juris, quod quisque tenetur scire, neminem excusat is the maxim of law.

Criminal Law. Incapacity.

6. The sixth main defect of the will is that which arises from compulsion or necessity; and falls under the third general Division. Here the will contradicts the act, is so far from consenting with it that it is rather disagreeable to it. The guilt of a crime consists in the freedom of the will, for a free agent can alone be guilty of a moral action.

Under this head there are several cases.

1. Right is that of civil subjection, by which the inferior is compelled to do wrong by his superior.

1. The subject is in subjection to his prince, if by his command he does a wrong act he should be executed. As the Sheriff who executes a prisoner by the authority of a Court who has jurisdiction, tho he be innocent, the Sheriff answers it.

2. Masters, Servants, Parents, & Children. Neither a servant or child should be executed by their moral subjection for having committed a crime. The obligation to obey the laws of society is superior to any obligation which a servant can owe his master or child to his Parents.

1 Com. 21.

1 Com. 28

1 Hale. 43.

1 Hawk. 3.

1 Com. 28

1 Hale. 43.

Criminal Law. Incapacity.

2. The chief rule of civil regulation is that of coverture or of the wife to the husband. The wife to all civil purposes & many criminal is considered in law as being sub potestate viri. The criminal cases are those alone which concern the present remarks.

As good a general rule perhaps as any is — that the wife is under the power of her husband in all civil cases, & in all capital criminal cases so as to be excused except in cases where the crime is malum in se & treason.

Comm. 28

In some inferior misdemeanors the wife may be indicted with her husband: as for keeping a bawdy house.

Hawk. i.

If a wife in company with her husband commit a base theft she is excused. She cannot be an accessory for receiving the stolen goods of her husband or feloniously, except in treason. If she commit a theft by the bare command of her husband be guilty of treason, murder robbery etc. may be indicted.

Hawk. i.

See the rest of the law on this subject in 4. Black. Comm. 29. 1. Hale. 516. 1. Hawk. 1, 5

Criminal Law. Incapacity.

1 Comm. 4. Another species of duress is what is called in law duress per minas; or threats & menaces which induce a rational fear of death.

Many laws are excused on this account. A person may for fear of death innocently kill an assailant. So in war we kill an enemy man to save himself.

5. The fifth case is when the necessity of death by force of nature or the will. So in case of two equals a man must struck the least. So where

1. Com. 31 a person is bound by law to perform a act & cannot do it with out killing some one.

In Eng. the King is such an eminently pure

1 Com. 82. & illustrious character, that in law he can do no wrong

Of Crimes in general.

"A Crime, or misdemeanor, is an act committed or omitted in violation of a public law. Crimes, in common speech, are of a deeper dye than other offences.

The distinction between public crimes or misdemeanors & private wrongs consists chiefly in this; that private wrongs, or civil injuries, relate more particularly to, and consist in violating the civil rights of individuals, considered in their individual capacity; whilst crimes or misdemeanors consist in the violation of some public law, the neglect of some duty due to the public considered as a community in its aggregate capacity.

Almost every public crime includes in it an injury to an individual; As murder, the person is murdered. The relation an injured Eng. may bear to the public is also as indeed of a member of society. In E. Eng. the public offence is strictly capital & forms a relation upon the private injury. In lesser crimes it is different. Comm. 5. In an action of battery — the person is fined in damages & forced to make satisfaction to the party injured. 2 Inst. 29. injured.

Crimes against God & Religion

The following crimes punishable in our own country will be briefly noticed. Those in the Eng. Books, which are not punishable here will be barely mentioned with particular reference to the Books in which they are treated at at length. I shall follow the order of Blackstone & Bisset pretty much.

2 Bisset 320 The crimes against God & Religion in this State are chiefly the following. 1. Blasphemy - II - Atheism - III - Polytheism - IV - Unitarianism - V - Apostacy - VI - Breach of Sabbath VII - Profane Swearing

These crimes with their moral punishments minutely & accurately described in the State Books

State Books 188. 368 187 The actions on these moral state in this State have been so few that there is little or no common law doctrine established by our Courts concerning them at least, which has no effect of consequence to state.

Of Offences against God & Religion.

I. Blasphemy. Blasphemy is when a person wilfully denies, or reproaches the being of a God or God himself, Death or Fine, or Holy Ghost, & the punishment at Stat Brit. 188.

Vol. 1. p. 88. Stat. Brit. 188.

This is a crime at com. Law punishable by fine & imprisonment or other corporal infamous punishment.

II. Atheism, is the denying of the being of a God either by writing teaching speaking or advising. For punishment see Stat. 2. Geo. 2. c. 21

Stat. 2. Geo. 2. c. 21

III. Apostacy is when a person, having been educated in the Christian Religion, shall maintain that there is more Gods than one, by writing teaching speaking or advising. Punishment as above.

Stat. 9 Geo. 2. c. 21

IV. Christianism is when a person, having been educated a Christian, by writing, teaching or advising preaching denies the Trinity, or asserting that either the Father, Son or Holy Ghost is God.

2. Geo. 2. c. 21. Stat. 9 & 188

Crimes against the Religion

2. Hawk. c. 32 § 1 Stat. 9 Ann. c. 18 § 1 Apostacy is when a person, having been educated a Christian, either by writing, teaching or advised speaking, denies the Christian Religion to be true & the Divine Authority of the Old & New Testament.

If a person is a second time convicted of any of the above offences he is by that fact disabled to sue, prosecute, plead or maintain any action or Information in Law or Equity; or be Guardian of any Child or Executor of any Will, or Administrator of any Estate; unless on the first conviction, he shall within twelve months in the Court where convicted, make a contrary opinion.

2. Hawk. c. 32 § 1 Stat. 9 Ann. c. 18 § 1 No person can be prosecuted for any of the above crimes unless the information thereof be given within six months.

Crimes against God & Religion.

VI. Breach of Sabbath consists in a variety of acts punished by Stat.

2. Sesh. Cases 325. The crimes which are punished as breaches of the Sabbath are so accurately defined in the Stat. that any fulminations or declamations on it could be a mere repetition of the ideas contained in the Stat. he held.

Stat. Book 308.

VII. Profane Swearing consists in swearing rashly, or profanely by the name of God, any other vain oath, or any sinful & wicked cursing any person. This crime subjects him to a fine from Pillory, or non payment, to sitting in the Stocks.

Stat. B. 1. 17

Sesh. 327.

Offences ag.t God & religion

The offences in the Eng. Law agt God & Religion are more numerous than in this State, the State having been erected in the days of superstition, and shewing had very inadequate ideas of God & Religion.

Most of these crimes are crimes also ~~crimes~~ by the common Law both in Eng. & ~~the State~~ Conn.

They are generally aggravated by Stat.

The following are the crimes in Eng. on this subject as given in Blackstone & others.

See Black. b. 4 c. 4

1. Apostacy
2. Heresy
3. Offences agt. established Church
   1. Deserting the ordinances
   2. Non conformity to the church
4. Blasphemy
5. Profane swearing & cursing
6. Witchcraft
7. Religious Imposture
8. Simony
9. Sabbath Breaking
10. Drunkenness
11. Lewdness

Offences agst God & Religion

This is the Schedule of the English Offences against God & Religion as given in Blackstone. For a more full explanation & Treatise of them see 1 Hawk. from page 5th to the 16th

1 Hales P.C. 2 Hales P.C.

1 Black. Com. from 41 to 66 &c

By comparing their system of Offences of this nature with our's we can see what parts are applicable & have been adopted —

Cases denied or doubted to be law

Cases or Books	Where	By whom	How, be denied, doubted or overruled
[illegible]	2 Ray. 1210. 1 Sun. 1786	[illegible]	
Cutbird 27	3 Term 125		overruled & denied
Prob. Ab. 919	3 Term 125 & 1 Lev. 153 2 Lev. 90	Butler	denied
Com. Dig.	3 Term 131	do.	do.

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